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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

SUPERIOR COURT

OF THE

CITY OF NEW YORK.



By JOSEPH S. BOSWORTH, LL.D.

LATE CHIEF JUSTICE OF THE COURT.

VOLUME IX.

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JUSTICES
OF THE
NEW YORK SUPERIOR COURT,
DURING THE TIME OF THESE REPORTS.

JOSEPH S. BOSWORTH, LL. D., *CHIEF JUSTICE.*
MURRAY HOFFMAN, LL. D.,*
LEWIS B. WOODRUFF, LL. D.,*
JAMES MONCRIEF,
ANTHONY L. ROBERTSON,
JAMES W. WHITE,
JOHN M. BARBOUR,†
CLAUDIUS L. MONELL,†

} *Justices.*

*Term of office expired Dec. 31, 1861.

†Elected Nov., 1861, for full term of six years, commencing January 1, 1862.



CASES

REPORTED IN THIS VOLUME.

A.		PAGE.			PAGE.
Acosta <i>et al.</i> , Clarke <i>v.</i> ,	158		Brush <i>v.</i> Kohn,	589	
Atlantic Mutual Ins. Co., Cock- roft <i>v.</i> ,	681		Burnett <i>et al.</i> <i>v.</i> Phalon,	198	
Atlantic Mutual Ins. Co. <i>et al.</i> , Taylor <i>et al.</i> <i>v.</i> ,	369		Butchers' & Drovers' Bank <i>v.</i> Jacobson,	595	
Atwell <i>et al.</i> , Morrison <i>et al.</i> <i>v.</i> , ..	503				
B.			C.		
Baare, Hanel <i>v.</i> ,	682		Campbell <i>v.</i> Parker,	322	
Bache, Betts <i>v.</i> ,	614		Carter <i>v.</i> Koesley,	583	
Baglioli, Theriott <i>et al.</i> <i>v.</i> ,	578		Case <i>v.</i> Banta,	595	
Banker, Field <i>et al.</i> <i>v.</i> ,	467		Chamberlain <i>v.</i> Dempsey,	212	
Bank of Mutual Redemption <i>v.</i> Sturgis <i>et al.</i> ,	608		Chamberlain <i>v.</i> Dempsey,	540	
Bank of Mutual Redemption <i>v.</i> Sturgis <i>et al.</i> ,	660		Chatham Bank <i>v.</i> Betts,	552	
Banta, Case <i>v.</i> ,	595		Cheeseman <i>v.</i> Sturges <i>et al.</i> ,	246	
Bartlett, Phillips <i>et al.</i> <i>v.</i> ,	678		Clarks <i>v.</i> Acosta <i>et al.</i> ,	158	
Bartlett <i>et al.</i> <i>v.</i> Robinson,	305		Cockroft <i>v.</i> The Atlantic Mutual Ins. Co.,	681	
Bellows, Purchase <i>v.</i> ,	642		Coghlan <i>v.</i> Dinsmore,	453	
Benson <i>v.</i> The New Jersey R. R. and Transportation Co., ..	412		Columbian Ins. Co., Swinnerton <i>et al.</i> <i>v.</i> ,	361	
Betts <i>v.</i> Bache,	614		Commercial Ins. Co., Mallory <i>et</i> <i>al.</i> <i>v.</i> ,	101	
Betta, The Chatham Bank <i>v.</i> , ..	582		Cook <i>et al.</i> <i>v.</i> Kelly,	358	
Black, Penny <i>v.</i> ,	310		Cowles <i>et al.</i> , Currie <i>v.</i> ,	642	
Blackly <i>v.</i> Jacobson <i>et al.</i> ,	146		Cumming <i>v.</i> Egerton <i>et al.</i> ,	684	
Broadway Bank, Van Blarcom <i>et al.</i> <i>v.</i> ,	582		Currie <i>v.</i> Cowles <i>et al.</i> ,	442	
Bronner <i>v.</i> Frauenthal,	356				
			D.		
			De Grauw, Delafield <i>et al.</i> <i>v.</i> , ..	1	
			Delafield <i>et al.</i> <i>v.</i> De Grauw, ...	1	

	PAGE.		PAGE.
Delafield v. Holbrook <i>et al.</i> ,	446	Howard v. Holbrook <i>et al.</i> ,	237
Dempsey, Chamberlain v.,	212	Howard v. The Orient Mutual	
Dempsey, Chamberlain v.,	540	Ins. Co.,	645
Dingeldein v. Third Avenue R.			
R. Co.,	79		
Dinsmore, Coghlan v.,	453		
		J.	
E.		Jacobson <i>et al.</i> , Blakely v.,	140
East River Bank v. Kennedy, ..	543	Jacobson, The Butchers' &	
Egerton <i>et al.</i> , Cumming v.,	684	Drovers' Bank,	595
Elston v. Potter,	636	Jaudon, White v.,	415
Exchange Fire Ins. Co., The		Johnston, Kane v.,	154
Mayor, &c., of New York v., 424			
		K.	
F.		Kane v. Johnston,	154
Field <i>et al.</i> v. Banker,	467	Kelly, Cook <i>et al.</i> v.,	358
Fielden <i>et al.</i> v. Lahens <i>et al.</i> , ..	436	Kelly <i>et al.</i> , Lowber v.,	494
Fettretch v. Leamy,	510	Kennedy, The East River Bank	
Forrest v. Forrest,	686	v.,	543
Frauenthal, Bronner v.,	350	Kefeltas, Stewart <i>et al.</i> v.,	261
		Koezley, Carter v.,	583
		Kohn, Brush v.,	589
G.		L.	
Geary v. Page <i>et al.</i> ,	290	Lahens <i>et al.</i> , Fielden <i>et al.</i> v., ..	436
Gebhard Fire Ins. Co., Phelps v.,	404	Law, Secor <i>et al.</i> v.,	163
Gilman v. Oliver,	589	Leamy, Fettretch v.,	510
Gordon, Hornby v.,	656	Lilienthal, Scott v.,	224
Gregory <i>et al.</i> , Pollak v.,	116	Lindo, Guilhon <i>et al.</i> v., (No. 1.)	601
Groupe <i>et al.</i> , Oeters v.,	638	Lindo, Guilhon <i>et al.</i> v., (No. 2.)	605
Guilhon <i>et al.</i> v. Lindo, (No. 1.)	601	Lowber v. Kelly <i>et al.</i> ,	494
Guilhon <i>et al.</i> v. Lindo, (No. 2.)	605		
H.		M.	
Hanel v. Baare,	682	McCreery <i>et al.</i> v. Willet,	600
Harriott <i>et al.</i> v. Wells <i>et al.</i> , ...	631	Mallory <i>et al.</i> v. Perkins <i>et al.</i> , ..	572
Harrison <i>et al.</i> , Niblo v.,	668	Mallory <i>et al.</i> v. The Commercial	
Hart, O'Rourke v.,	301	Ins. Co.,	101
Henning v. The New York and		Mayor, &c., of New York v.	
New Haven R. R. Co. <i>et al.</i> , .	283	The Exchange Fire Ins. Co., .	424
Hoffman <i>et al.</i> v. Miller <i>et al.</i> , ..	334	Metcalf <i>et al.</i> , Patrick <i>et al.</i> v., .	483
Holbrook <i>et al.</i> , Delafield v.,	446	Milbank, Wright <i>et al.</i> v.,	672
Holbrook <i>et al.</i> , Howard v.,	237	Miller <i>et al.</i> , Hoffman <i>et al.</i> v., ..	834
Hornby v. Gordon,	656	Moffat v. Strong,	57

TABLE OF CASES.

vii

	PAGE.
Moore v. Westervelt,	558
Morris v. Walsh,	636
Morrison et al. v. Atwell et al., .	503
Murray v. Smith,	689

N.

New Jersey R. R. and Trans- portation Co., Benson v.,	412
New York and Harlem R. R. Co., Tracy v.,	396
New York and Harlem R. R. Co., Tracy v.,	615
New York and New Haven R. R. Co. et al., Henning v.,	283
Niblo v. Harrison et al.,	668

O.

O'Connor v. Such et al.,	318
Oeters v. Groupe et al.,	638
O'Keefe et al., Williams v.,	536
Oliver, Gilman v.,	589
Orient Mutual Ins. Co., Howard v.,	645
O'Rourke v. Hart,	301

P.

Page et al., Geary v.,	290
Parker, Campbell v.,	322
Patrick et al. v. Metcalf et al., ..	483
Penny v. Black,	310
Perkins et al., Mallory et al. v., .	572
Phalon, Burnett et al. v.,	192
Phelps v. The Gebhard Fire Ins. Co.,	404
Phillips et al. v. Bartlett,	678
Pollak v. Gregory et al.,	116
Potter, Elston v.,	636
Poultney v. Randall,	232
Pratt et al. v. The Union Mutual Ins. Co.,	97
Puckhoffer et al., Rutter v.,	638
Purchase v. Bellows,	642

R.

	PAGE.
Randall, Poultney v.,	232
Read et al. v. Worthington et al.,	617
Richards et al., Taylor v.,	679
Robinson, Bartlett et al. v.,	305
Rutter v. Puckhoffer et al.,	638

S.

Scott v. Lilienthal,	224
Secor et al. v. Law,	163
Slater v. Wood,	15
Smith, Murray v.,	689
Stewart et al. v. Keteltas,	261
Strong, Moffat v.,	57
Sturges et al., Cheeseman v., ...	246
Sturgis et al., The Bank of Mu- tual Redemption v.,	608
Sturgis et al., The Bank of Mu- tual Redemption v.,	660
Such et al., O'Connor v.,	318
Swinnerton et al. v. The Colum- bian Ins. Co.,	361

T.

Taylor v. Richards et al.,	679
Taylor et al. v. The Atlantic Mu- tual Ins. Co. et al.,	369
The Atlantic Mutual Ins. Co., Cockroft v.,	681
The Atlantic Mutual Ins. Co. et al., Taylor et al. v.,	369
The Bank of Mutual Redemption v. Sturgis et al.,	608
The Bank of Mutual Redemption v. Sturgis et al.,	660
The Broadway Bank, Van Blar- com et al. v.,	532
The Butchers' & Drovers' Bank v. Jacobson,	595
The Chatham Bank v. Betts, ...	552
The Columbian Ins. Co., Swin- nerton et al. v.,	361
The Commercial Ins. Co., Mal- lory et al. v.,	101

	PAGE.		PAGE.
The East River Bank v. Kennedy,	543	Tracy v. The New York and	
The Exchange Fire Ins. Co., The		Harlem R. R. Co.,	615
Mayor, &c., of New York v.,	424	Treadwell <i>et al.</i> v. Williams <i>et al.</i> ,	649
The Gebhard Fire Ins. Co.,			
Phelps v.,	404	U.	
The Mayor, &c., of New York		Union Mutual Ins. Co., Pratt <i>et</i>	
v. The Exchange Fire Ins. Co.,	424	<i>al.</i> v.,	97
The New Jersey R. R. and Trans-		V.	
portation Co., Benson v.,	412	Van Blarcom <i>et al.</i> v. The Broad-	
The New York and Harlem R.		way Bank,	532
R. Co., Tracy v.,	396	W.	
The New York and Harlem R.		Walsh, Morris v.,	636
R. Co., Tracy v.,	615.	Wells <i>et al.</i> , Harriott <i>et al.</i> v.,	631
The New York and New Haven		Westervelt, Moore v.,	558
R. R. Co. <i>et al.</i> , Henning v.,	283	White v. Jaudon,	415
The Orient Mutual Ins. Co., How-		Willet, McCreery <i>et al.</i> v.,	600
ard v.,	645	Williams v. O'Keefe <i>et al.</i> ,	536
Therriott <i>et al.</i> v. Baglioli,	578	Williams <i>et al.</i> , Treadwell <i>et al.</i>	
The Third Avenue R. R. Co.,		<i>v.</i> ,	649
Dingeldein v.,	79	Wood, Slater v.,	15
The Union Mutual Ins. Co., Pratt		Worthington <i>et al.</i> , Read <i>et al.</i>	
<i>et al.</i> v.,	97	<i>v.</i> ,	617
Third Avenue R. R. Co., Dingel-		Wright <i>et al.</i> , v. Milbank,	672
dein v.,	79		
Tracy v. The New York and			
Harlem R. R. Co.,	396		

CASES ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK
AT GENERAL TERM

**RUFUS K. DELAFIELD and GEORGE BAXTER, Plaintiffs
and Respondents, v. AARON DEGRAUW, Defendant and
Appellant.**

1. The plaintiffs agreed to deliver to the defendant a certain quantity of cement, to be packed in air tight oak barrels, and to be subject to inspection of the United States Government inspector, and to be delivered at New York or Rondout (on the Hudson) at specified prices, at a credit of thirty days from the time of delivery, plaintiffs reserving the right to pack it in hard wood barrels if the Government would receive it so; and the contract expressed that the cement was for the Pensacola Navy Yard.

Held, 1. That by the true construction of this contract, delivery, and acceptance by defendant, at New York or Rondout, entitled the plaintiffs to payment thirty days thereafter, although the cement had not within that time been approved on inspection at Pensacola. Passing inspection was not a condition precedent to the right to demand payment.

2. That such right was, however, liable to be defeated by the rejection of the cement on inspection at Pensacola; and if so rejected before suit brought, the defendant might avail himself of it as a failure of the consideration of his contract, and would not be restricted to setting it up as a counterclaim.

3. That by accepting cement packed in barrels, which were neither oak nor air tight, the defendant waived the provision of the contract which required such barrels, but might nevertheless rely on the provision that it should pass inspection.

4. That to establish a defense as to any part of the cement which was rejected upon inspection, defendant must have notified the plaintiffs, not

Delafield et al. v. DeGrauw.

only of its rejection, but also that it was at their disposal or was subject to their orders, and must, in some manner (adapted to its then situation), have furnished them with the means of controlling it. Merely informing the plaintiffs that a part of it had been "rejected at Pensacola," (without saying how much), "and that it lay there," is not enough.

5. That to establish a counterclaim for damages for such breach, defendant must prove his damages. Proof of mere rejection on inspection would entitle him at most to nominal damages; and this alone is not ground for reversing a judgment against him for the price.

6. In such an action, evidence tending to show that the cement was rejected because injured by careless handling on the part of the defendant is admissible.

7. Evidence of a conversation between the parties at the time of delivery, as to the quality of the barrels, and evidence that the Government gave plaintiffs leave to use hard wood barrels instead of oak, may be competent; but evidence of the conversation of the parties at or before executing the contract, as to where they intended the inspection to be had, and what they meant by delivery, is not competent.

8. *Held, further*, that a general offer by defendant to give evidence of money paid by him to remove the worthless part of the rejected cement which was required by his contract with the Government before he could be paid for any of that which was received, when no proof had been given that it was worthless, nor any evidence as to how it was disposed of, nor any proof of an offer to return it, was properly refused.

9. An agreement by the plaintiffs with the master of a vessel which the defendant chartered, to pay demurrage for delay, cannot form the basis of a counterclaim by the defendant against the plaintiffs for such demurrage paid by him.

10. Were it otherwise, it would not be admissible to inquire of a witness what the master demanded; but the inquiry should be, how long was the vessel detained and what was the rate or amount of the demurrage?

2. At the close of the trial, it is in the discretion of a Referee, whether he will allow depositions to be read as to matters which should be proved by a plaintiff or defendant before he rests, and his refusal to allow it is not matter of exception.
3. Moreover, where such depositions are not embodied in the case on appeal, the Court cannot review the Referee's discretion in this respect.

(Before BOSWORTH, Ch. J., and WOODRUFF and WHITE, J. J.)

Heard, November 11; decided, December 7, 1861.

APPEAL from a judgment entered on the report of S. P. Nash, Esq., as Referee.

Rufus K. Delafield and George Baxter sued Aaron A. DeGrauw, on a contract, by which Delafield and Baxter had agreed "to deliver to Aaron A. DeGrauw forty-two

Delafield et al. v. DeGrauw.

hundred barrels of hydraulic cement, to be equal in quality to the best Rosendale or Newark manufacture, to be packed in air-tight, oak barrels, well lined with paper, each barrel to contain not less than three hundred pounds of cement, and to be subject to the inspection of the United States Government inspector, and at said Aaron A. DeGrauw's option as to the place of delivery, to be delivered at the following places at the option of said DeGrauw, viz.: Rondout, at the tackle of the vessel, ninety cents per barrel; New York City, at the tackle of the vessel, ninety-five cents per barrel, at a credit of thirty days from the time of delivery, to be approved paper. Delafield & Baxter reserve the right, if the United States Government will receive the cement in hard wood barrels, to pack the same in such barrels; all the cement to be received by Aaron A. DeGrauw within four months. The above cement is for Pensacola Navy Yard."

The complaint alleged performance by plaintiffs, by delivering in various parcels, and admitted a part payment, and demanded judgment for the balance due.

The answer, admitting the contract, denied performance, and alleged that, although the plaintiffs had placed on board certain vessels, bound to Pensacola, certain barrels of the cement, the said cement was not according to the contract, and did not bear the inspection of the United States Government inspector, as required by the contract; but, on the contrary, a great part was rejected by the inspector and was not received by said Government; and further alleged that, upon plaintiffs' assurance that the cement so delivered was in accordance with the contract, the defendant had paid the plaintiffs in part, but that the cement was never accepted by him.

In a subsequent part of the answer the defendant alleged, for a counterclaim, that the plaintiffs failed to perform the contract, and did not furnish cement of the proper quality, nor was the same packed as by the contract they had agreed; and that by reason thereof the defendant was compelled to purchase other cement and other barrels at an advanced price, and to pay freight on the same, and commissions

Dehafield et al. v. DeGrauw.

and expenses about the same, and about the cement furnished by the plaintiffs; all which sums of money he claimed to recover of the plaintiffs.

The answer also contained another counterclaim for demurrage of a vessel chartered by the defendant, and which demurrage defendant alleged was incurred for the benefit and at the request of plaintiffs, and on their promise to pay therefor.

On the trial, one of the plaintiffs, examined as a witness, was permitted, against defendant's objection, to testify as to conversations with the defendant in respect to the cement, at or after the delivery, at which the defendant, or one of his clerks, expressed his satisfaction at the quality of the barrels.

The plaintiffs offered in evidence their correspondence with officers of the Government, in which the latter gave their consent to have the cement delivered in hard wood barrels instead of oak. This evidence was admitted against the objection of defendant.

The defendant offered evidence as to what was said by the parties to the contract, at the time of its execution, as to whether the inspection intended was to be in Pensacola or New York, and as to whether "delivery" in the contract meant delivery to defendant or to the vessel. This evidence was excluded and the defendant excepted.

The grounds of the other exceptions sufficiently appear in the opinion of the Court.

The Referee found that plaintiffs delivered the number of barrels of cement agreed; and that the cement was in quality what was required by the contract, and was packed in barrels well lined with paper, but that the barrels were not oak barrels nor air tight as required by the contract.

That the cement was delivered at New York and Rondout, on board of vessels furnished by the defendant, and was by him received and carried to Pensacola.

That of such cement some three hundred barrels did not pass the inspection of U. S. Government inspectors at Pensacola, but defendant did not return said cement or

Delafield et al. v. DeGrauw.

notify plaintiffs to take it back, nor did he show what disposition was made of it, or what damages he sustained by reason of its defective packing, or its not passing inspection. That the cement was received by defendant at New York and Rondout without being inspected there by any Government inspector, nor did defendant require it should be so inspected before such delivery.

As matter of law the Referee found that plaintiffs were entitled to recover; and that defendant not having returned any of the cement, or notified plaintiffs to take it back, nor shown what damage he had sustained, he was not entitled to recover on the counterclaim therefor.

E. C. Benedict, for the defendant, (appellant.)

I. The Referee erred in his construction of the contract. The quality, packing and inspection, were conditions precedent.

II. The word delivery has two senses. In the sense of placing under the control of defendant, the cement was to be delivered at Rondout or New York. In the sense of final transfer of the property, it was to be delivered at Pensacola, after inspection.

It was competent to prove which of these was intended in this contract.

III. The conduct of the parties, as proved, was a practical construction of the contract to the effect that passing inspection was a condition precedent.

IV. It was not necessary to show any return of the rejected cement, or any disposition of it, in this action.

H. G. De Forrest, for the plaintiffs, (respondents.)

I. Upon the facts proved and found, the plaintiffs were clearly entitled to recover.

They proved a substantial performance. Defendant waived defects, if any, by accepting the delivery.

II. If inspection was to take place in New York, defendant should have procured it before the vessels sailed.

If defendant had the right to insist upon inspection in

Delafield et al. v. DeGrauw.

Pensacola, he waived that right, so far as visible, patent defects were concerned, by accepting the cement with the knowledge beforehand that it might be rejected.

III. But so far as the demand for the price is concerned, it is immaterial whether the plaintiffs took the risk of inspection at Pensacola or not.

The contract fixed the places of delivery and the time of payment. And the inspection of the cement was not, therefore, a condition precedent to payment.

Both on principle and authority the rejection of the three hundred barrels was no bar to an action for the price, and the only remedy of the defendant would be a recoupment or counterclaim. (*Pordage v. Cole*, 1 Saund., 320, note; *Tompkins v. Elliot*, 5 Wend., 496; *Grant v. Johnson*, 6 Barb. S. C. R., 337, reversed in Court of Appeals; 1 Seld., 247; *McCullough v. Cox*, 6 Barb. S. C. R., 386.)

IV. The defendant might have recovered any loss suffered by him on account of the rejection of the three hundred barrels, but made no attempt to show that he did in fact lose anything.

V. For the reasons stated in the third point it was wholly immaterial whether the Government modified the contract or not.

VI. The correspondence as to the modification was, however, properly admitted.

VII. The unambiguous written contract cannot be explained by parol evidence, as defendant sought to do.

VIII. The Referee was also right in excluding the contract between the Government and DeGrauw.

To allow it to be incorporated into the defendant's contract by any proof short of a written memorandum, would be violating the rule as to parol evidence. (*Draper v. Snow*, 20 N. Y. R., [6 Smith,] 331.)

IX. The existence, and the terms of the written contract between the Government and DeGrauw, were wholly immaterial as between him and the plaintiffs.

Delafield et al. v. DerGauw.

X. The depositions offered are not annexed to the record; and as they were rejected because not rebutting evidence, which was matter of discretion with the Referee, his refusal to admit them will not be interfered with.

BY THE COURT—WOODRUFF, J. By the true construction of the contract between the parties to this action, the plaintiffs were to deliver the stipulated quantity of cement either at Rondout or at the City of New York, at the option of the defendant. Upon delivery, the plaintiffs were entitled to payment, according to the terms of the stipulation, "at a credit of thirty days from the time of delivery, to be approved paper." But such delivery, although it entitled the plaintiffs to payment at the stipulated rates and credit, was not to be an absolute and unconditional delivery which should be final between the parties, so that the reception of the cement by the defendant, and its transportation to Pensacola, was a final acceptance of the cement as performance of the contract by the defendants. By the terms of the contract, the cement was to be "subject to the inspection of the United States Government inspector," and this, in connection with the further declaration in the contract that "the above cement is for the Pensacola Navy Yard," shows that the delivery of the cement was intended to be, and was, in fact, qualified by the condition that although delivered in Rondout or New York to the vessels referred to, and for transportation to Pensacola, such delivery and the defendant's acceptance were subject to inspection by the proper officer of the United States who was charged with such duty.

In this view of the meaning and construction of the contract, if the cement did not pass inspection, by reason of any failure of the defendants to furnish the proper quantity in such packages as the contract called for, then the plaintiffs had not performed the contract on their part.

The delivery and acceptance were conditional, and the rejection of the cement for just cause would defeat both.

Delafield *et al.* v. DeGrauw.

But we concur in the opinion of the Referee, that the frame of the contract is such that the stipulations of the parties were independent. The time of payment being fixed with reference to the actual delivery, the plaintiffs were entitled to sue for and recover the stipulated price on the expiration of the stipulated credit, without waiting to learn whether the cement had arrived in Pensacola, or even though it had never arrived there, and, *a fortiori*, without waiting to learn whether the cement was approved on inspection.

The delivery of the cement, and its acceptance by the defendant or the agents whom he employed to receive it, and the expiration of the term of credit, made the plaintiff's cause of action complete. The condition upon which the delivery and acceptance might fail, should it afterwards happen, would entitle the defendant to reclamation, but the possibility that the cement might be rejected, would not be any defense.

In this sense, the agreement of the defendant to pay for the cement was independent; although it did depend upon the delivery of the cement, it did not depend upon its passing inspection as a condition precedent to his obligation to make payment.

These views, in their application to the case before us, do not very materially differ from the conclusions of the Referee, and do not necessarily lead to any different result. This consequence, however, seems to us to follow; the failure of the cement to pass inspection, if that happened before suit brought, might be used as a defense to the action. We think it would avail the defendant as a failure of the consideration of his contract to pay therefor; and that the defendant would not be confined to a counterclaim, for his protection. To treat it as a strict counterclaim, is to limit the defendant to the use of this rejection of the cement as an independent cause of action in his own favor, to be governed alone by the rules applicable to it, if he sued the plaintiffs for a breach of their contract.

Delafield et al. v DeGrauw.

We think the defendant not so restricted. For example, suppose, by reason of the failure of the plaintiffs properly to pack the cement, no part of it had been accepted, and the defendant had made a proper tender of redelivery thereof to them, as not satisfying the condition upon which it was delivered and accepted, and the plaintiffs thereafter brought suit.⁶ The defense would have been perfect; not necessarily or solely on the ground that the defendant had sustained damages to the extent of the contract price—for if the cement was of any considerable value, that would not be true—but on the ground that the condition on which the delivery and acceptance were made had failed, and so the consideration for the defendant's agreement to pay had failed, and he was therefore not bound to pay anything. Indeed, in such case, he would not be bound to show that he had sustained any damage. He was not bound to retain the cement if it did not satisfy the condition, and having returned that which was conditionally received, he was not liable at all. He, in such case, is in the position of one who, on the breach of the contract by the other party, rescinds and restores such party to the condition in which he was before the breach. This view of the rights of the parties is fully sustained we think, by *Grant v. Johnson*, (1 Seld., 247,) and does not conflict with *Tompkins v. Elliot*, (5 Wend., 496.)

In such case the party not in fault might, if he choose, set up the breach of contract by the other as a cause of action in his own behalf, and so make it the subject of counterclaim. What we mean is, that if the condition failed before action brought, he would not be confined to this, nor be bound to give proof of damages; he might, (if he had returned the goods or made a proper tender thereof,) use the failure of the condition as a defense to the action. (*Wiltsie v. Northam*, 3 Bosw., 169; *Gleason v. Moen*, 2 Duer, 644.)

And, on the other hand, it is obvious that if he had in fact paid for the goods at the end of thirty days, and the cement was thereafter properly rejected on inspection, he

DeLafield et al. v. DeGrauw.

would necessarily have been driven to an action. But the same distinction would have been applicable to that as is above suggested. He might return or tender the goods, and sue for and recover back the consideration money; or he might sue for damages. In the first case he would not be bound to prove damages; and in the second he must show what loss he sustained.

The defendant, by his answer herein, has set up the facts upon which he relies, both as a defense and also as constituting an affirmative cause of action or counterclaim. And the inquiry before the Referee was properly whether he had established his case in either aspect.

FIRST. The Referee finds that the cement was not packed in the manner required by the contract. But, as the delivery was made and the cement accepted, subject to inspection, that fact becomes of no materiality, provided it passed inspection. The provisions of the contract itself enabled the plaintiff to pack in other than the stipulated barrels, if the United States would accept it. The Referee, therefore, properly held that the defendant, by accepting the cement, waived the provision prescribing oak barrels, resting, however, upon the other condition that the cement should pass the proper inspection. The result was that all of the cement, except three hundred barrels, did pass inspection, and as to the cement so approved, there is an end of all question.

SECOND. Three hundred barrels did not pass inspection. In respect to these, what were the rights of the defendant? Clearly, either to return or tender them to the plaintiffs, or to rely on his claim for damages. He might do either. But the Referee finds that the defendants did not return the three hundred barrels, nor notify the plaintiffs to take them back, and if not, the defendant cannot make use of this breach of condition as a failure of the consideration of his contract, or as any ground for refusing to pay therefor. And the Referee has also found that the defendant has not shown what disposition was made of them, or what damages he sustained by reason of the defective packing or their not

DeLafield et al. v. DeGrauw.

passing inspection. And if not, then the defendant wholly failed to establish any affirmative cause of action entitling him to any abatement from the plaintiff's recovery. In strictness he was, perhaps, entitled to nominal damages, but to that only.

Unless, then, the findings of the Referee are contrary to the evidence, his conclusions of law are correct; for, although the view we have taken of the rights of the parties differs somewhat from that expressed by the Referee, the effect of its application to this case, upon the facts found, is substantially the same.

The defendant, if he proposed to claim that the three hundred barrels of cement should not be allowed to the plaintiffs at all, should have proved that he returned them or offered to do so. By this we do not mean to say that he was bound to transport them back to New York and redeliver them there. Under the circumstances of this case, he was probably not bound to do so. The property was delivered by the plaintiffs with a view to its being carried to Pensacola, and it was their fault that it did not satisfy their contract. But the defendant should at least have notified them, not only that it did not pass the inspection, but that the cement was at their disposal, or was subject to their orders, and in some manner (adapted to its then situation) have furnished them with the means of controlling it, so that they might have caused it to be returned to New York, or have directed its disposal as they saw fit. Perhaps the language of the Referee, in his finding, sufficiently defines the defendant's duty in this respect; he should have "notified the plaintiffs to take it back."

He did not do this; he, by his agent, the master of the vessel, caused one hundred and eighty-eight barrels of the rejected cement to be sold, and what disposition was made of the residue the Referee finds was not shown. On looking at the evidence we find it testified that after its rejection this residue of one hundred and twelve barrels was taken to a warehouse. How long it remained there

DeLafield et al. v. DeGrauw.

is not stated. The defendant, therefore, did not return or offer to return the rejected cement, nor notify the plaintiffs to take it, nor place it in their power to do so.

The only testimony which in this respect is supposed to conflict with the finding of the Referee is that of the defendant himself, who says that after he heard of the rejection of the cement, he told one of the plaintiffs "that the cement was rejected at Pensacola, a part of it; that the Government wouldn't receive it, and that it lay there." In relation to this testimony two observations are pertinent: Much of the testimony of the defendant, embracing some of the particulars of this alleged conversation, was directly contradicted by the plaintiffs, and how far the Referee deemed the testimony entitled to credit, we cannot say. But second, this was no proper tender of the cement to the plaintiffs, and it did not furnish them the means of obtaining it. On the contrary, it gave them no information of the number of barrels; it was not acted upon by the defendant himself as an offer to give up the cement to the plaintiffs. He sold the larger portion thereof, and there has never been a moment when, by reason of anything said or done by the defendant, the plaintiffs could have taken into their own possession one barrel of the cement. If the defendant had intended that they should do so, it was his duty to have done so much, as, by a clear election on his part to give up the possession, would have enabled them to procure it. We cannot say that the finding of the Referee is in this respect against the evidence.

In regard to the finding that the defendant did not show that he had sustained any damage, we think the Referee was clearly right. The defendant did not prove for how much the one hundred and eighty-eight barrels were sold, nor what had been done with the residue, nor whether it was still on hand, nor what would be the cost of other suitable cement delivered at Pensacola, nor how in any manner he sustained damages, or to what extent; and his right to nominal damages would not call for any interference with the judgment.

Unless, then, some error was committed in receiving evidence objected to by the defendant, or in rejecting evidence offered by him, the judgment should be affirmed.

We have examined the numerous exceptions taken by the defendant, and are constrained to say, that we think that none of them require us to reverse the judgment. Most of his exceptions are disposed of by the views already expressed, as the objections out of which they arose proceed upon the idea that the receipt on board the defendant's vessels was not a delivery or an acceptance entitling the plaintiffs to demand payment.

Other exceptions relate to proof tending to show that the rejection of the cement was caused by injury thereto, resulting from careless handling of the barrels on the part of the defendant. Such proof, we think clearly competent, and yet if it were not so, it wrought no prejudice, as the Referee imputes the rejection of the cement wholly to the plaintiffs' neglect to pack it in such barrels as the contract required.

The plaintiffs' conversation with the defendant, was in its nature competent evidence, and it was not irrelevant to the controversy. We see no just ground for the defendant's objection thereto, and his exception.

The correspondence with the officers of the Government does not appear to have had the slightest influence on the decision, since the Referee found the plaintiffs in fault, and it could not under his finding of the facts affect the view we have above taken of the rights of the parties. But it could not have been said in advance, that it was wholly irrelevant, when the contract itself was made subject to modification in respect to the kind of barrels to be used if the consent of the Government was obtained.

Other testimony was offered by the defendant to prove conversations antecedent to or contemporaneous with the making of the written contract. This evidence was, we think, within the rule that all such conversations and negotiations are to be deemed merged in the written instrument, and they could not be permitted to alter or enlarge

or affect the obligations of either party. The proof was, therefore, properly rejected.

And this evidence was proposed to be given in connection with the contract of the government, as a means of showing that the plaintiffs in effect undertook to perform that contract. The answer to this, so far as not already last above given, is that the written contract contained no such assumption, and it is clear and intelligible, and could not be enlarged by parol.

There was an offer by the defendant, in very broad and comprehensive terms, to "give evidence of money paid by him to remove the worthless part of the rejected cement, which was required by his contract with the government, before he could be paid for any of that which was received." The offer assumed that the cement was worthless, which the defendant had not proved nor attempted to prove: it also proposed to make the terms of his contract with the Government a ground for imposing these expenses on the plaintiffs. But besides these suggestions, if the defendant had offered the plaintiffs this portion of the cement, or required them to take it back, possibly the expense of removing and taking care of the cement would have been chargeable to them. And had the defendant proved the disposition made of the cement, and showed himself entitled to damages, the expenses of making the removal and sale might have been taken into view; but keeping the cement and not accounting for its disposal, the naked evidence of the expense of removing it would furnish no ground to claim those expenses from the plaintiffs. The claim to recover the freight of the rejected cement is liable to the same answer.

Another exception was taken by the defendant. It was to the rejection of this question put to the defendant: "How much demurrage was demanded of you by the captain of the Burrett for detention at Rondout?" This vessel was one which went to Rondout to receive cement. It was claimed to have been proved that the plaintiffs agreed with the captain of the vessel that if they detained her

Slater v. Wood.

over the time within which they agreed to load her, they would pay the demurrage, and the witness said he thought they agreed to load her in two or three days.

If it be assumed that the agreement by the plaintiffs to this effect was sufficiently proved, and was sufficiently definite to be binding, still it was an agreement with the captain and not with the defendant, and so distinctly testified. And, again, what the captain demanded was not the inquiry, even if the agreement had been made with the defendant. The proper question was, how long was the vessel detained, and how much was the demurrage for that delay.

In regard to the only exception not covered by the observations already made, viz., the offer of the defendant at the close of the trial to read several depositions, two remarks must suffice.

FIRST. They were offered to show matters which formed a part of the defendant's case on his counterclaim in the first instance, and not to prove matters in rebuttal; they went to the whole ground of recovery. The opening of a case for the reception of such evidence, after the party has rested, lies in the discretion of the Court or Referee.

SECOND. The appellant has not seen fit to embody those depositions in the case, and the Court cannot, therefore, say that any injustice was done, nor whether, in any view, (if the discretion of the Referee is open to review here,) his ruling was an exercise of his discretion, in such a manner as should induce the Court to grant a new trial.

The judgment must be affirmed.

LEMUEL S. SLATER, Plaintiff and Respondent, v. FERNANDO WOOD, Defendant and Appellant.

1. The Mayor of the city of New York, claiming, but without right, to be at the head of the police of the city, and having under his control a large body of men organized for that purpose, and known as the Municipal Police, was informed that the Metropolitan Police, which was then the legal police force of the city, were about to eject the street commissioner of the city from his office in the City Hall, violently and without process of law. He accordingly called together the Municipal Police, and while they were guarding the

Slater v. Wood.

building, a coroner, having an order for the arrest of the Mayor, came to the City Hall to execute it, accompanied by a number of the Metropolitan Police, as a *posse comitatus*, of which the plaintiff was one. Their attempt to enter for the purpose of arresting the Mayor was resisted by the Municipal Police, and in the fray the plaintiff was injured.

Held, 1st. That, although the Municipal Police, as an organized police force, was an illegal organization, and the Mayor had abused his authority in keeping it on foot, yet that such assemblage of the men, if solely for the purpose of resisting a forcible expulsion of the Street Commissioner from his office, assuming, as the charge does, that "the Mayor, in his discretion, was authorized as chief magistrate of the city, to interpose by force, if necessary, to prevent it," was not, necessarily, as matter of law, an unlawful assembly. The Mayor, being charged with the duty of causing laws for the preservation of the peace to be kept, is not confined to calling to his aid the lawful police for the purpose of resisting unauthorized violence, but may call on any citizens, and may by their aid resist the lawful police, if they are about to commit such wrong.

2d. That if the assembly were claimed to be unlawful by reason of the circumstances under which it appeared, and the manner in which the persons composing it were conducting themselves, the question whether these circumstances and conduct were such as would alarm persons of reasonable firmness and courage, is one which belongs to the Jury to decide.

3d. If the assembly was not an unlawful one, the Mayor is not liable in a civil action, for wrongs done by individual members of it, having no connection with the object for which it was convened, to which he was in no way privy, and of the purpose to commit which he had no knowledge or suspicion.

4th. And if the Mayor did not know that the Coroner had previously come to serve the order of arrest, and took no measures to secure a free entrance to him, the mere fact that the Coroner, on coming with the *posse*, made proclamation at the entrance of the City Hall, of the object of his visit, and was resisted by the Municipal Police, would not make the Mayor liable for the plaintiff's injuries.

2. Under the Code of Procedure, (§§ 185, 419,) the Coroner may call to his aid the power of the county, in a proper case, in executing an order of arrest in an action in which the Sheriff is a party.
3. The mere fact that the officer had not, at the time of summoning the power of the county, a sufficient cause for summoning them, does not affect the duty of the persons summoned to aid him if, when they come together, resistance is offered to his executing the process, nor does it affect the consequent liability of those who make or cause such resistance, except that it may perhaps affect the question of damages.
4. *Held*, (by WARR, J.,) that, upon the evidence, the assembly in question was an unlawful one.

(Before BOSWORTH, Ch. J., HOFFMAN, WOODRUFF, MONCRIEF, ROBERTSON and WHITE, J. J.)

Heard, May 18-25, 1861; decided, December, 21, 1861.

THIS was an appeal from a judgment entered on a verdict.

The facts material to the questions determined appear in the opinion of the Court. The trial was had before Mr. Justice SLOSSON and a Jury, commencing on the 13th of December, 1858, and concluding on the 11th of January, 1859. The plaintiff recovered a verdict for \$250.

Charles O'Conor, for the defendant, (appellant.)

I. The attack upon the people at the rear of the City Hall, was wholly unwarrantable; and any injury which the plaintiff may have suffered in the course of it, was the natural and necessary consequence of his own wrongful act. 1. The officer would not have had authority to call the power of the county and use it in such a grossly aggressive and mischievous manner, even to serve criminal process or an execution in a civil case; 2. Such a proceeding, for the purpose of serving *mesne* process for a small amount in a civil case, is a criminal violation of law, of decency, and of humanity; 3. The persons engaged in it, however inferior their agency, cannot recover from the intended victims of their violence. Their remedy, if any, is against those who led them.

II. The exceptions to the admission of evidence offered against defendant, and the rejection of evidence offered in his behalf, were well taken.

III. The refusal to charge as requested touching the proclamation was erroneous.

IV. The several points in the charge excepted to by the defendant were erroneous.

David Dudley Field, for the plaintiff, (respondent.)

I. The order of arrest was a lawful command issued by this Court, which the Coroner was bound to obey.

II. In executing it he was authorized to call to his aid the power of the county. (Code, §§ 185, 419; 2 R. S., 441, §§ 80, 84; Revisers' note, "1 R. L., 423, § 11, varied so as to declare the full extent of the power as it exists;" Act

Slater v. Wood.

of 1845, ch. 69; 8 Bac. Abr., 589, "Rescue;" Noy, 40; 2 Saund., 345, note A.; see also Con. Generalis, 332, citing 13 Edw., 1, § 1, c. 30; 2 Hen., 5, c. 8; 1 Ferguson's Queen's Bench, Com. Pleas & Ex. Practice, 61, citing Cro. Eliz., 668; Dalton on Sheriffs; 2 Lev., 144; 3 Id., 46; Noy, 40.

III. The respondent, being summoned for service, was bound by law to obey. (2 R. S., 441, § 82.)

IV. Being bound by law to obey, the right of protection was commensurate with the duty of obedience.

V. The plaintiff, therefore, may recover against any wrongdoer who attacked and injured him. Whether defendant was, in any manner responsible for the injury, becomes, then, the only question.

VI. He was, for, 1st. He incited the assault. 2d. It was made by persons who were acting in concert with him. (*Guille v. Swan*, 19 Johns., 381; *Williams v. Sheldon*, 10 Wend., 654; *Coats v. Darby*, 2 Comst., 517; *Bishop v. Ely*, 9 Johns., 294; *Snydam v. Moore*, 8 Barb., 367. 3d. He had collected an unlawful assembly, for whose misconduct, under the circumstances of this case, he was responsible.

And here as to the point that the assembly was illegal:

1. The old police were all in revolt against the law. They were acting in combination to resist the law. They were acting under persons, who had no authority over them, and resisting those who had. (§§ 31, 92 of Metropolitan Police Act.)

2. The new members were admitted into an unlawful combination. They were not only unlawfully admitted, but unlawfully sworn.

3. If the men assembled under the defendant on the 16th of June, had not been members of an illegally organized body, they would still have constituted an unlawful assembly, at common law.

(1.) Combining and assuming to defend the City Hall, or the Hall of Records, against even an illegal attack was unlawful; the law not allowing any person to do so, except in defense of his own house. (9 Car. & Payne, 91, 431; 1

Slater v. Wood.

Russ. on Cr., 254, 255; 1 Hawk. P. O., 274, 516, §§ 9, 10; 3 Rich., 337; 1 Rice, 258; 2 McCord, 118; 6 Shep., 346; 4 Penn. Law Jour., 31; Cow. & Hill's Notes, 176, 180, 588, 604; 3 Stark. Ev., 1509; 2 Carr. & P., 232; 5 Id., 154; Addis., 277; 1 Hill S. O., 361.) -

(2.) The defendant, as mayor, had no authority to collect and arm a body of men, to defend a public building against even an illegal assault.

(3.) Even if the defendant might have collected and armed a body of men to defend a public building, or provide against a riot, he could not collect and arm any body of men to act against the police of the district.

(4.) The Metropolitan Police Commissioners and the sheriff are the only public officers who are charged with the duty or power to use an armed force, to defend the city, or preserve the peace. (§§ 5, 11, 20, Metropolitan Police Act.)

As to the point that all who give countenance to an unlawful assembly, or give occasion to an assault, are criminal parties, (see 1 Russ. on Cr., 254; 3 B. & A., 566; 6 C. & P., 81; 2 Salk., 595, 1 Id. 335; 6 Mod., 43; 13 Geo., 322; Addis., 277; 2 Camp., 233; 3 S. & R., 230; 2 Stark. Ev., 403, 1509; 19 Johns., 381; 10 Wend., 654; 2 Comst., 517; 9 Johns., 294; 8 Barb., 367.)

VII. Even if it had been true, that the motive of obtaining the order of arrest was not a good one, that would not in any way have lessened the plaintiff's duty to obey the summons of the Coroner. *Elder v. Morrison*, (10 Wend., 138,) has no application to this question. There the process did not command the act of the officer, and the person summoned in his aid knew this as well as he did. But a ministerial officer need not look beyond the letter of the order delivered to him. (*Webber v. Gay*, 24 Wend., 485; *People v. Warren*, 5 Hill, 440; see also *Sheldon v. Van Buskirk*, 2 Comst., 473.)

VIII. The attack, however, upon this motive is puerile.

IX. It moreover appears affirmatively, on the part of the plaintiff, that the proceedings against the defendant

Slater v. Wood.

were rendered necessary by his continued disturbance of the public peace, his contumacy towards the Courts and his defiance of the laws of the land.

X. The defendant's counsel having, in his opening, dwelt upon two exceptions only, no others will be considered by the plaintiff. One of them affects that portion of the charge which relates to the character of the assembly at the City Hall. On this head authorities have already been referred to, under the sixth Point.

XI. The other exception relates to the admission of the declarations of persons at the riot or going thither, respecting the character and purposes of the assembly. This kind of evidence has been often held to be admissible in such cases. (*King v. Hunt*, 3 B. & Ald., 566; 1 Greenl. Ev., 111; 3 Id., 93; *Johnson v. State*, 29 Ala., 62; 2 Stark. Ev., 405, 1509, and cases cited in notes.)

XII. The defendant does not appear to have moved at the Special Term for a new trial, on the weight of evidence, and therefore that question does not arise. If it had arisen, a slight analysis of the printed case would have shown, not only that the verdict was justified by the evidence, but that the Jury could not have found otherwise.

BY THE COURT—BOSWORTH, CH. J. The plaintiff has recovered a verdict against the defendant for an assault and battery committed upon him on the 16th of June, 1857, in the rear of the City Hall of the City of New York. The injury was inflicted by some person or persons in a crowd collected at the place where the violence was suffered. The defendant was not present when the injury was committed, nor was he one of, or in sight of, the crowd from which it proceeded.

The complaint alleges that the persons who injured the plaintiff, "acted under the orders and directions of the defendant, who commanded and incited them to commit the said assault upon him." The answer "denies that the persons mentioned in plaintiff's complaint, or any other person or persons, acted under the orders or directions of this

Slater v. Wood.

defendant, in committing any assault upon the plaintiff; defendant denies that he incited or commanded said persons, or any person or persons, to commit any assault upon the plaintiff."

These allegations present the only questions of fact raised by the pleadings, except the question whether the plaintiff was assaulted while in the peaceable discharge of his duty as a policeman.

A few weeks prior to the transaction in question, the existing Metropolitan Police Act took effect. The Mayor and certain members of the police force did not recognise the validity of this statute, nor the authority of the Commissioners of Police created by it. The crowd was composed mainly of these disaffected or insubordinate members of the police force, and had been assembled by order of the defendant, and are called in this case, the Municipal Police. The defendant insisted that he assembled them solely to resist the expulsion by force, of Turner, the Deputy Street Commissioner, from his office. The Street Commissioner had then recently died. Mr. Conover had been appointed by the Governor to fill the vacancy, and was making vigorous efforts to obtain possession of the office, and of the property pertaining to it. The plaintiff insisted that the assembly was convened to resist the service of process on the defendant, and to obstruct the Metropolitan Police, (as those are called who recognized the new law,) in the performance of their duty. The judge declared this crowd or assembly to be, as matter of law, an unlawful assembly. Prior to the assault complained of, the Coroner had been to the Mayor's office to serve an order of arrest upon him. He did not see the defendant, but had conversation with an officer stationed at the door of defendant's office; and he and that officer are in direct conflict, as to what was then said by either of them to the other. After that, and on the same day, the Coroner returned with a posse consisting of members of the Metropolitan Police, for the purpose of serving that order of arrest.

Slater v. Wood.

They had a conflict with the crowd or Municipal Police at the rear entrance to the City Hall; the plaintiff was one of the Coroner's posse, and was injured. This suit is brought to recover damages for that injury. This brief statement will make those portions of the charge, which we have specially considered, intelligible, and their application obvious.

The Judge charged, that "there is no proof that the defendant gave any direct command that this attack and assault should be made," "and the great question before us is, whether the Mayor, (the defendant in this action,) incited or commanded the men who committed this assault—assuming that they did commit it—to do it."

The Judge also instructed the Jury that the act of April, 1857, (ch. 569), entitled, "An act to establish a Metropolitan Police District, and to provide for the government thereof," took effect from and after the first meeting of the Board of Police created by it, and that such first meeting was held on the 23d of April, 1857.

That from and after that event, the power of the old Board of Police was at an end. That its right to act as an organized body for the preservation of the public peace was gone. That the act of the defendant, in attempting to perpetuate the organization of the old police, after the first meeting of the new Board of Commissioners under the new laws, and in supplying by new incumbents the places of those who united with the new police, was illegal; "and the body of men thus organized by him under the name of police, was an illegal body, in so far as it assumed to be a police organization."

"This body of men were assembled in the City Hall on the morning of June 16, 1857, principally by directions of the defendant, * * * * and I feel bound to say, that the meeting in question constituted an unlawful assembly." (The defendant excepted to this instruction.)

"The Court, on the evidence before it, pronounces, as matter of law, that the assemblage was unlawful; for it holds that the assembling together of an illegal force,

Slater v. Wood.

armed, and with circumstances to create terror, or to provoke to a breach of the peace, of itself constitutes the meeting unlawful. Did its illegality depend on the motive of the act, or the object of the meeting only—and there was doubt on that question—upon the evidence, it would have been your province to have decided, whether or not this was an unlawful assembly.” (The defendant excepted to the instruction “that there was no question for the Jury as to the character of the assembly referred to, and that, as matter of law, it was unlawful.”)

The Judge also charged, that “even if it be admitted that the object for which this force was thus assembled was that contended for by the defendant, to wit, the protection of Mr. Turner, the then acting Street Commissioner, in the possession of his office and its properties, against the threatened violent attempts of Mr. Conover, with the assistance of the Metropolitan Police, or others, to wrest that possession from him, the assembling of this force for that purpose was illegal.” (To this instruction the defendant excepted.)

He also charged, that conceding Turner to be the lawful incumbent of the office; that he and not Conover was in the actual possession of it, “and that the Mayor, in his discretion, was authorized, as chief magistrate of the city, to interpose by force, if necessary to prevent his ouster; this could be done lawfully, only by the employment of the Metropolitan Police force itself.” (To this instruction the defendant excepted.)

“And it is no answer to this to say that *that* was the very body from which the wrong was apprehended.” (To this proposition the defendant excepted.)

“It makes no difference either, that the apprehension of a violent attempt, on the part of the Metropolitan Police, to force Mr. Conover into this office may have been well founded.” (To this proposition the defendant excepted.)

“There is no aspect of the question which this case presents in which the Court can do otherwise than pronounce

Slater v. Wood.

the act in question an illegal act." (To this proposition the defendant excepted.)

Having instructed the Jury that this assembly was an unlawful assembly, the Judge then proceeds to state the rules by which the liability of the defendant, for the acts of the persons composing it, was to be tested and determined.

He charged the Jury that "the plaintiff" [at the time and place, when and where he was injured] "was there as a part of a *posse comitatus*, raised by the Coroner to aid him in the service of civil process; not as a policeman, acting under the orders of a police commander."

He also charged that if the Jury believed "the object of the assemblage was to protect the Deputy Street Commissioner in the peaceable possession of his office, and neither resistance to legal process, nor the prevention of the entry of the Metropolitan force, or any part of it, into the City Hall formed any part of such object, then the defendant is not responsible, unless you shall find he knew before the fight that the Coroner had been to his office to serve him with a warrant, and took no measures to secure a free entrance to him, or shall find that the Coroner made proclamation at the entrance of the hall of the object of his visit, and was resisted by the Municipal force." (To this instruction the defendant excepted.)

Is it a sound proposition that this was, as matter of law, an unlawful assembly, if it be conceded that it was brought together solely to prevent Conover from expelling Turner from the Street Commissioner's office by force, that Turner was the lawful incumbent of the office and in possession of it, and that the Mayor, in his discretion, was authorized, as chief magistrate of the city, to interfere by force, if necessary, to prevent his ouster? The Judge charged, that conceding such to be the facts, the assembly was an unlawful one.

The reason why, on such a state of facts, the Judge declared that the assembly, as matter of law, was an unlawful one, seems to be based to some extent on the idea that the Metropolitan Police was the only force that

could be used for that purpose ; and that, if that body was the one by which the apprehended wrong and violence were to be committed, they must be submitted to, and resistance would be unlawful.

We do not so understand the law. The Metropolitan Police Act (Laws of 1857, ch. 569,) confers no license upon the board of police thereby constituted, nor upon any member of the police force, to invade the rights of persons or of property. Nor does it deprive any citizen of the right of defending himself against a wanton and unprovoked assault, or of defending his own property, or that which he is charged with the duty of protecting, against attempts to seize it forcibly, without right, and without process of law, though the wrongdoer may be a Metropolitan policeman, or any other officer charged with the duty of preventing a breach of the peace.

Section five of that act declares that it shall be the duty of the board of police thereby constituted, "at all times of the day and night, within the boundaries of the said, 'the Metropolitan Police District;' to preserve the public peace; to prevent crime, and arrest offenders; to protect the rights of persons and of property," &c.

The Metropolitan policemen can find no warrant in the act under which they are appointed, for forcibly and without process of law expelling a legal incumbent from his office, and installing another person in his stead. Nor is there anything in that act making it unlawful to use any means to resist such an attempt, which might lawfully be employed, if any other persons were about to perpetrate the same outrage.

If it be conceded that Turner was the lawful incumbent of the office; that he and not Conover was in the actual possession of it, and that the Mayor, in his discretion, was authorized, as chief magistrate of the city, to prevent the ouster; we have no doubt that he might lawfully employ as such force any citizens who were willing to aid him in resisting the threatened expulsion of Mr. Turner from his office.

Slater v. Wood.

It is elementary law that a man is justified in using the force necessary for the defense of his wife, child, or servant, or the possession of his property. So, also, that a child may justify in defense of a parent, or a wife in defense of her husband, or a servant in defense of his master.

So it has been held that, though a warrant has been issued, if it be not enforced by a proper officer, or if it be executed out of the jurisdiction without being backed by the proper magistrate, or if the wrong person be taken under it, the party may legally resist the attempt to apprehend him, and even third persons may lawfully interfere to oppose it, doing no more than is necessary for that purpose. (1 Chit. Cr. Law, 60, [61;] *The King v. Osmer*, 5 East, 304; *Adey's Case*, 1 Leach, 206; 1 East P. C., 295, 310, 325; Fost. Cr. L., 312; see 7 Cow., 269; 5 Denio, 352; *Elder v. Morrison*, 10 Wend., 128; *The People v. Hubbard*, 24 Id., 369; and *Curtis v. Hubbard*, 1 Hill, 336.)

In *Phillips v. Trull*, 11 J. R., 486, it was affirmed by PLATT, J., without any dissent by the other Judges, that "any person whatever, if an affray be made, to the breach of the peace, may, without warrant from a magistrate, restrain any of the offenders, in order to preserve the peace," although after the affray is at an end no private person can, of his own authority, arrest the offender. (See also, *Holley v. Mix*, 3 Wend., 350, and *Scribner v. Beach*, 4 Denio, 448.)

It has also been held, that riding in a body to quell a riot is lawful, and no information will be granted for small irregularities in the pursuit of such a design. (1 Chit. Cr. L., [18;] see *Hancock v. Baker et al.*, 2 B. & P., 264; Wharton's Am. Cr. L., 728; and Russell on Crimes, [8 Am. ed.,] vol. I, p. 266.)

Power is conferred by statute on mayors of cities "to cause to be kept, all laws made for the preservation of the public peace." (2 R. S., 704, § 1.) Every person who, in their presence, shall threaten to beat another, "or to commit any offense against his person or property," may be ordered by them, without any other proof, to give security

Slater v. Wood.

to keep the peace; and in case of refusal so to do, may be committed by them to prison, by warrant, until the prescribed security be given. (*Id.*, 705, § 8.)

If the Mayor had been present when an attempt was made by force, without process of law, to eject Mr. Turner from his office, and take from him the property connected with and pertaining to it, he might not only have used the force requisite for the preservation of the peace, but he might have ordered all persons engaged in the unlawful act to give security to keep the peace; and on their refusal to comply with the order, have issued a warrant and committed them to prison.

The chief magistrate of a city, vested with the power and clothed with the duty of causing all laws made for the preservation of the public peace to be kept, having information that an assemblage of men is about to eject by force and without process or authority of law, an officer of one of the departments of the City Government, from his office, and take from his possession and control the property belonging to it, and having reason to believe that this assemblage of men was to be composed of those specially charged with the duty of preserving the public peace, and of protecting the rights of persons and of property, (Laws of 1857, ch. 569, § 5,) who should take no measures to prevent the outrage, would be censured as derelict in duty, and unfit to hold the office to which he had been elected.

As we understand the charge of the Judge, he instructed the Jury that the assemblage of men convened by the Mayor, though convened for such a purpose, and for such a purpose only, was, as matter of law, an unlawful assemblage.

And we understand him to have so charged, partly on the idea, that if the Metropolitan policemen were about to commit such an act of unauthorized violence, they could not lawfully be resisted by the Mayor; at all events, that he could only call to his aid Metropolitan policemen. That although the assembly was convened for a lawful

Slater v. Wood.

purpose, and to prevent the perpetration of a wrong which the Mayor in his discretion might use force to prevent, yet the assembly was an illegal one, for the reason in part, that only Metropolitan policemen could be employed by the Mayor, to prevent such an unlawful act.

In this, we think the learned Judge fell into an error.

If the sole object of convening the assembly was to prevent the expulsion of Turner by force from an office of which he was the lawful incumbent, the assembly was not, necessarily, as matter of law, an unlawful one. An assembly is an unlawful one, where three or more persons assemble themselves together to do an illegal act. (4 Bl. Com., 146; 3 Inst., 176.) So any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity of the neighborhood, is an unlawful assembly. *Reg. v. Vincent*, (9 C. & P. 91; *Reg. v. Neale et al.*; Id., 431.) It is stated in elementary treatises and in adjudged cases, that the difference between an unlawful assembly and a riot is this: If the parties assemble in a tumultuous manner and actually execute their purpose with violence, it is a riot; but if they merely meet upon a purpose which, if executed, would make them rioters, and having done nothing, they separate without carrying their purpose into effect, it is an unlawful assembly. (*Rex v. Birt et al.*, 5 P. & C., 154; 4 Bl. Com., 146; 3 Inst., 176; Russell on Crimes, [8 Am. ed.,] vol. 1, pp. 266, 272, 273; Archbold Cr. Pl., [Waterman's ed.,] vol. 2, p. 934, note [1,] and pp. 937, 942 and 945.)

If the assembly was convened by the Mayor solely to prevent the forcible expulsion of Turner from his office, without process of law, then it was not unlawful, by reason of the purpose or object of its meeting. If claimed to be unlawful, by reason of the circumstances under which it appeared, and the manner in which the persons composing it were conducting themselves, the question whether these circumstances and this conduct were such as would

Slater v. Wood.

frighten and alarm—not any foolish or timid person—but persons of reasonable firmness and courage, was one which it belonged to the jury to decide. (*Reg. v. Vincent*, 9 Car. & P., 91; and *Reg. v. Neale et al.*, Id., 431.)

The persons so assembled were individually members of the police force of the city, in a state of insubordination, in the sense that they did not recognize the new Police Act, or the authority of the Commissioners of Police created by it. They wore the uniform of conservators of the peace, a uniform which they were accustomed to wear; and the only weapons of offense and defense which they had, they had carried daily and publicly for years. The evidence tending to show that they acted in a tumultuous manner, or evinced any purpose to move from the place where they were stationed, or to do any act except in resistance of an attempt to expel Turner from his office, if there be any, is exceedingly slight. Assuming that it was the sole object of their meeting to protect Turner and the property belonging to his office from lawless invasion, and that no order for the arrest of the defendant had been made, so that no collision had in fact occurred between them and the Metropolitan Police or any other persons, it is far from being clear that an indictment against them as an unlawful assembly would be sustained by the verdict of a Jury.

The conduct of the defendant and of all who acted with him in their opposition to the execution of the Metropolitan Police Act, in so far as his or their resistance was forcible, and was continued and maintained by declarations and orders calculated to bring the law into contempt, was in a high degree reprehensible. That when the law-making power had enacted and promulgated the law, neither the defendant, in his exercise of the high functions pertaining to his office, nor any citizen, however humble, can be justified in resorting to other than peaceful means to test its constitutional validity, is quite clear; and when the defendant assumed, by addresses and orders, to keep up the existing organization and compel its members to yield him obedience, he abused the authority he had theretofore

Slater v. Wood.

exercised over the body, and the proper influence of his office.

And in conduct such as this he acted illegally, and the organization which he so kept together was an illegal organization. This is settled by the decision of the Court of Appeals in *The People v. Draper*, (15 N. Y., 532,) and is not open here, and was not questioned on the trial of this cause. Had the Judge on the trial confined himself to this view of the defendant's conduct, and in this sense pronounced it illegal, and the assemblage, in so far as it constituted a part of an organization for the preservation of the peace of the city, an organization existing or kept up without warrant of law, certainly it would not have been erroneous.

But it by no means follows from this that any members of the so-called Municipal Police, convening for a lawful object in a peaceful manner, not to commit overt acts of violence, but only to resist them, if illegally made, was an unlawful assembly in the sense in which that term is used in the law.

The fact that the persons composing this assembly continued to act as policemen under the organization existing, and the laws in force at the time the act of April 15, 1857, took effect, and that they did not recognize the authority of the Police Commissioners created by that act; and whatever they did from day to day as an organization, tending to show a connection between their hostility to that act and the purpose of their meeting on the occasion in question, may properly be considered with the other evidence given, in determining whether they were then assembled to do an illegal act; or whether they were convened under such circumstances as, according to the opinion of rational and firm men, were likely to produce danger to the tranquility of the neighbourhood.

If they were assembled to do an illegal act, whether that act was resistance to the service of process, or an interference with the Metropolitan policemen in the per-

formance of any of their duties, then the assembly was unlawful.

But if they met for a lawful purpose, and if there was nothing in the manner in which they conducted themselves justly calculated to produce alarm or endanger the public tranquility; if their whole purpose was to prevent an act which would be a breach of the peace, and not in any event to do anything wrong in itself, or in an improper manner; their general attitude in regard to the act of April 15, 1857, would not, as matter of law, make the assemblage in the supposed case an unlawful one, and indictable as such.

Whatever may have been their hostility to the new Police act, if they were not assembled with any reference to that subject on the occasion in question, that hostility would not, of itself and alone, make the assembly, necessarily, as matter of law, an unlawful one. Three or more of these insubordinate policemen could meet for a lawful purpose, and conduct in an orderly manner, and such a meeting would not constitute an unlawful assembly merely because they did not divest themselves of the uniform and lay aside the clubs of policemen.

The judge did not charge contrary to these views. He charged that the body of men organized by the defendant, under the name of police, in attempting to perpetuate the organization of the old police, "was an illegal body, in so far as it assumed to be a police organization."

But in enumerating the circumstances which he grouped together, and which, in his view, made the assembly unlawful; in addition to the number of persons assembled, the uniform in which they appeared, the weapons they carried, and the organization under which they acted; he assumed and stated "that there could have been no rightful object to be accomplished by such an assemblage so ostensibly acting as a police, which might not have been done and lawfully done by the sworn conservators of the peace—the legal police of the city, then in full force and organization." This latter fact, assuming

Slater v. Wood.

it to be established by the evidence, is one entitled to great consideration. But if it be true, or if it be established by the evidence, that the legal police force of the city was about to expel Turner from his office by violence; and if the Mayor, in his discretion, might lawfully interpose by force to prevent this, and if the assemblage was convened by the Mayor solely to prevent such an expulsion; then there was a rightful object to be accomplished by this assemblage which could not have been then accomplished through the agency of the Metropolitan Police.

We think, therefore, that it is a sound proposition, that the services of the Municipal Police might be employed for a lawful purpose and in such a manner that a body of them met for that purpose, and acting in that manner, would not be subject to indictment as constituting an unlawful assembly.

To suppose an extreme case, we may suppose that the Mayor knew of the purpose of a body of men to commit a riot, and believing that the Municipal Police would faithfully aid him in preventing or suppressing it, he thereupon convened at a convenient point, as large a number as on the present occasion, and in fact used them successfully, in a proper manner, to quell a riot; we think it quite clear that, as an assembly so convened and thus acting, they could not be regarded as an unlawful assembly within the common law meaning of that term.

And, in view of all the evidence, we think it was a question for the Jury, under proper instructions as to the law, whether the assembly in question was or was not an unlawful one.

If the assembly was not an unlawful assembly, the defendant is not liable for the wrongs of individual members of it, having no connection with the object for which it was convened, to which he was in no way privy, and of the purpose to commit which he had no knowledge or suspicion.

The Judge evidently considered this to be the law. For, although he charged, that as matter of law, the assembly

Slater v. Wood.

was an unlawful one, yet he also charged (5th) that if its object "was to protect the Deputy Street Commissioner in the peaceable possession of his office, and neither resistance to legal process, nor the prevention of the entry of the Metropolitan Police force, or any part of it, into the City Hall formed any part of such object, then the defendant is not responsible, unless you shall find he knew before the fight that the Coroner had been to his office to serve him with a warrant, * * and took no measures to secure a free entrance to him, * * or shall find that the Coroner made proclamation at the entrance of the hall of the object of his visit, and was resisted by the Municipal force."

This instruction (rejecting the concluding alternative) concedes that the defendant is not liable, if the object of the assemblage was such as it recites, provided he did not know before the fight that the Coroner had been to his office to serve him with a warrant.

And, with reference to the evidence as to the intent of the defendant, the Judge also instructed the Jury in these words, viz.: "Before, however, I leave this subject, in regard to the intent, it is proper that I should say that the Mayor, whose examination was certainly very close, and whose answers were very deliberately given, most unequivocally and expressly denies that the object of assembling that force on that day had any connection whatever with an anticipated arrest."

So that, had the cause been submitted under the instruction now under consideration, (excluding the concluding alternative,) the verdict would have been for the defendant, if the Jury had credited this unequivocal and express declaration of the defendant, that the object of the assemblage had no connection whatever with an anticipated arrest, and had also found that it was no part of its object to prevent the entry of any part of the Metropolitan Police into the City Hall, and that the defendant did not know, before the fight, that the Coroner had been to his office to serve him with a warrant.

And if it be true that the sole object of the assemblage

Slater v. Wood.

was to protect Turner in the possession of his office, and that it was no part of its object to resist the service of legal process or prevent the Metropolitan Police force from entering the City Hall, and that the defendant did not know before the fight that the Coroner had been to his office to serve him with a warrant, and that in such case the defendant is not liable in this action, (as the charge distinctly states,) even though the assembly was unlawful; it is difficult to conjecture on what principle he is to be held liable, merely because "the Coroner made proclamation at the entrance of the hall of the object of his visit, and was resisted by the Municipal Police."

That resistance had no connection (in the case now supposed), with the object of the assembly, was not an act to which the Mayor assented, nor one which he anticipated, and was wholly foreign to any purpose or anticipation of his in convening this assembly.

This proposition assumes, (what the Judge in another part of his charge expressly declared,) that although this was an unlawful assembly, the defendant is not necessarily liable for all of its acts, merely because he convened it. And if it be law, that on all the facts stated in the above 5th proposition being found in the defendant's favor, except the fact of the Coroner's making proclamation and being resisted as there stated, the defendant is not responsible; then the Judge clearly erred in holding that under such circumstances the fact that the Coroner made proclamation at the entrance of the hall of the object of his visit, and was resisted by the Municipal force, would make him responsible.

Such a rule charges the defendant with the consequences of that resistance, although he was not present, and knew nothing of the proclamation or of the resistance, and did not authorize or contemplate the resistance, or subsequently assent to it; and so charges him solely on the ground that a proclamation was made which he did not and could not hear, while it at the same time holds that he would not be liable if no proclamation had been made.

Slater v. Wood.

We think this view of the law erroneous, and that the error in this part of the charge entitles defendant to a new trial.

The defendant's counsel insists, (and he argued the proposition as being, in his judgment, of paramount importance,) that a Coroner, when acting in the service of an order of arrest, cannot call to his aid the power of the county. The Judge charged that he had authority to call the power of the county to aid him, in effecting service, if such aid was necessary; and the defendant excepted to the instruction.

The Judge also charged: "That if the Coroner had no authority for the employment of this force, then the plaintiff was not justified in the attempt to enter the hall. The plaintiff was there as a part of a *posse committatus*, raised by the Coroner to aid him in the service of civil process, not as a policemen acting under the orders of a police commander. If resistance at the hall to the plaintiff, as a member of the posse, was not, under the circumstances, unlawful, it did not become so by reason of the plaintiff being a member of the police. The plaintiff was bound to follow the Coroner, as a member of his posse, when summoned, at the hazard of being deemed guilty of a misdemeanor if he did not; yet he took the risk of the Coroner's authority."

* * "The employment of the posse without necessity, is a great offense; for it is a cardinal principle that, in the service of process, the Sheriff [or a Coroner] 'must not be guilty of oppression, nor make use of other force nor greater violence than the thing requires.'"

"The plaintiff was justified by the actual command which he received from the Coroner, to act as one of his posse on this occasion."

In the present case, Coroner Perry held an order, made in a civil action, requiring the defendant to be arrested and held to bail. Although designated as process, in the case and in the charge of the Judge, it was an order to arrest and hold to bail.

The Code, in section 185, declares how the order shall be executed, and provides that the Sheriff "may call the

Slater v. Wood.

power of the county to his aid in the execution of the arrest, as in case of process." This section certainly grants this power to the Sheriff, and authorizes him to employ it "to his aid in the execution of the arrest." (See *Howden v. Standish*, 6 Man., G. & Scott, 504.)

Section 419 enacts that "if the Sheriff be a party" to any "summons, order or judgment" which is to be served or executed, "the Coroner shall be bound to perform the service, as he is now bound to execute process where the Sheriff is a party; and all the provisions of this act relating to Sheriffs shall apply to Coroners when the Sheriff is a party."

These sections authorize the Coroner to call to his aid the power of the county in executing an order of arrest. Whether he found, or had reason to apprehend that resistance would be made to the execution of the order, was a question for the Jury, if the determination of it was material to a just disposition of the action.

So, too, was the question whether the Coroner made known to the persons assembled in the rear of the City Hall the object of his visit; or whether under the circumstances and upon the evidence they had reason to suspect any other purpose than to assail and disperse them, as a part of the means devised to expel Turner from his office and intrude Mr. Conover into it, or from some other motive which they were left to conjecture.

We think the Coroner, in one view of the evidence, may have been justifiable in summoning persons to aid him in executing the order, and at the same time that the defendant may not be liable for the assault.

If the Coroner had previously been to the office of the defendant to execute the order, and then told the officer stationed at the door of defendant's office that he was one of the Coroners of the city and had an order for the arrest of the Mayor issued from the Superior Court, and requested that officer to so inform the Mayor, and if that officer then went into the Mayor's office, and, on returning, stepped up to him, put his hands on his arm and said

Slater v. Wood.

"Coroner, I am sorry to say that I have orders to put you out of the office," the Coroner might well apprehend resistance to his execution of the order, and be justified in calling to his aid the power of the county.

And yet, if it was at the same time true that the Mayor had not been informed, and had no reason to suppose that the Coroner had been there to serve the order of arrest, and did not know that an order for his arrest had been issued, and if it was no part of the object of convening the assembly to resist the service of process, or the Metropolitan policemen in the performance of their official duties, but if on the contrary his sole object in convening this assembly was to protect Turner in the possession of his office against an illegal attempt to expel him by force, the defendant would not be liable.

Whether it would have been more discreet or not for the Coroner, under all the circumstances, to have foreborne further efforts to execute the order until after the close of the defendant's official labors for the day, he was not bound to do so.

Having gone peaceably and alone to serve the order, if (as he testified) he then distinctly stated to Mr. Ackerman, the person stationed by the defendant at the door of his office to announce the names of persons calling and their business, that he was a Coroner and had come with an order in a civil action for the arrest of the defendant, to execute it, and was notified by that person, after he had thereupon gone into the Mayor's office, that he had orders to put the Coroner out of the office; the Coroner was under no legal duty to forbear until some future occasion, with a view to ascertain if he might then be permitted to serve it.

But if, as Ackerman testifies, the Coroner did not state the object of his visit, but on the contrary, on being told the Mayor could not see him that day as he was engaged, was asked "had you not better defer your business to some other time?" and he replied "very well, I will call again; good morning," and then left, there would

Slater v. Wood.

be nothing in the interview itself which would justify him in then raising the power of the county to aid in executing the order.

But the mere fact that the Coroner had no cause for summoning a posse, is not a bar to this action. It is undoubtedly true that persons summoned to aid a Coroner in serving process will not be protected by the order of the Coroner, if he attempt to arrest a person not named in it. And if such person resist, and in making such resistance as is reasonably necessary to prevent being arrested, the posse are injured, no action can be maintained by them for such injury.

So, too, if the process should be executed in such manner as would make the Coroner a trespasser, as by forcibly breaking open the outer door of a defendant's dwelling house, the Coroner and all participating in such misconduct would be liable in an action at the suit of a party thus illegally arrested. (*Dalton on Sheriffs*, 528; *Elder v. Morrison*, 10 Wend., 128; *Curtis v. Hubbard*, 1 Hill, 336; *The People v. Hubbard*, 24 Wend., 369.)

There may be other modes of abusing process, and other kinds of misconduct in the execution of it, in which those conscious of the abuse and misconduct and participating in it would find no protection in the fact that they were, at the time, a part of the Sheriff's or Coroner's posse.

But persons summoned as a posse are bound to aid in overcoming resistance if it be offered. They may lawfully attend the Sheriff or Coroner in obedience to his order, although he had no sufficient cause for summoning them. While they in his aid do nothing unlawful or in an improper manner, and have no reason to suppose that he intended in summoning them to use their services unnecessarily or unlawfully, his order protects them so far at least as to justify them in accompanying him.

And although, in this case, the Coroner summoned the posse without any reason to apprehend resistance, but when he came to the City Hall he found the assemblage in question, yet if he then informed the persons there

assembled that he had an order for the arrest of the defendant and had come to execute it, and if they, with this knowledge, resisted him to prevent his serving it, the posse might lawfully aid him; and it would be as truly their duty to aid him as, if being casually there, they had been summoned after the Coroner had informed the crowd who he was, and of his business, and had encountered resistance.

It is deemed important to state these propositions, inasmuch as we cannot foresee that even if the plaintiff shall ultimately recover, the question of damages, as whether they may be exemplary or must be strictly compensatory, may not be affected to some extent by the consideration whether the posse was summoned with or without cause. If summoned without cause, that fact will form a feature in the history of the case, and may qualify the character of the transaction as a whole, although the plaintiff's right to recover may not depend upon proof of there being any cause for summoning a posse at the time it was summoned, or may not be impaired by proof that it was summoned unnecessarily.

There were many other exceptions taken at the trial which have not been noticed in the views already expressed, and which were not discussed on the argument of this appeal. If, upon another trial, there shall be an endeavor, as we may presume there will be, to present the case divested of all questions except those of substance, and to exclude all incidents not necessarily affecting the merits, many questions which we have omitted to decide may not again be raised.

We do not deem it important to either party, to pass distinctly upon any questions not already considered. The views stated render it necessary to reverse the judgment and grant a new trial. The costs of the former trial and of this appeal, must be costs in the cause and abide the event.

ROBERTSON, J. Under the views taken by the learned Judge who presided at the trial of the issues in this case,

Slater v. Wood.

it would seem that the defendant could only be made liable, by proof of some direction by him, to some one, to do some act which must necessarily lead to the assault complained of, or of such a state of facts, as would legally throw the responsibility of it upon him, notwithstanding his absense at the time of its commission and his failure to participate in it; for he came to the conclusion upon the evidence, that "the defendant had no personal agency in such assault; was not present or assisting at it, did not give any orders for its commission," and might be assumed to have known nothing of its occurrence until after it had happened.

The learned Judge seems to have found something to fasten the responsibility of the act in question on the defendant, when he might not otherwise have been liable, in the character of the assembly; because he says, that although not legally liable for every illegal act done by the persons present at it, still, by being a member of it or guilty of convoking it, he was placed "in a position in which the law might cast upon him the consequences of the events which occurred." As he subsequently arranged the different views that might be taken of the facts and their legal consequences, under different instructions, they may be assumed to comprise the circumstances which he considered would make the members or conveners of such an unlawful assembly responsible for any acts done by it. If, therefore, the fact of the assembly being unlawful, bore at all upon the defendant's liability, either as a qualification of the propositions by which, under certain contingencies, as the Jury might find them, they were to make this defendant liable, or otherwise, it became material that the views of the Court should be correct on that point. The Jury were charged as matter of law that the assembly was in law, unlawful; and the mode in which it became so was detailed by the learned Judge; if there was, therefore, any inaccuracy in that view, the defendant was seriously prejudiced.

There seem to be two modes in which an assembly of persons may become unlawful, so as to be a subject of indictment; one, by the purpose for which it meets, and the other, without regard to its purpose, by the numbers and demeanor of those present at it. (4 Black. Com., 146; 3 Inst., 176; 1 Hawk. Pl. C., 576; (Curw. ed.) Russ. on Cr., 272.) The learned Judge seems to have considered the assembly in question to have been rendered unlawful in the second mode, because he stated that it was not essential that the object of the meeting should be wicked to render it illegal, and that if such illegality depended on such object, he would have submitted the question to the Jury, and also because he brought together in detail the elements which he considered likely to create public apprehension, out of which the unlawfulness arose, and they did not include the purpose of the meeting. He seems to have passed upon the effect of such elements as matter of law, without evidence of their actual effect, as has been allowed in similar cases. (*Queen v. Vincent*, 9 C. & P., 275.) It becomes necessary, therefore, to determine whether the evidence justified the assumption, as matter of law, of the existence in this case of the elements of illegality which were combined by him; whether they alone would constitute an illegal assembly; and whether there was no evidence of anything else to qualify their effect of standing alone. For this purpose the considerations of the ability of a body of legal policemen to accomplish every legal purpose for which the body in question met, and their own capacity to do mischief, if badly guided, may be laid out of view, as equally applicable to any large assembly, however tranquil or innocent.

The main circumstances from which the learned Judge drew the inference of the creation of apprehension in the public mind, and danger of a breach of the peace, which he considered essential to constitute the unlawfulness of an assembly where its purpose was out of view, besides numbers, were, the uniforms worn, the clubs carried, and obedience to orders issued by some of the assembly. I

Slater v. Wood.

think it will be found, on investigation, there existed circumstances in the case which might have deprived these of their terror to the public eye, and the Jury might have found they did so, if the question had been submitted to them. The actual number present, of those summoned by the defendant, does not seem to have greatly exceeded, if at all, two hundred; these were in the City Hall, apart from the crowd in the park, whom curiosity, or possibly a worse motive, drew together; they were divided again into two nearly equal parts, one of which was in the basement of the City Hall, out of view, while persons in pursuit of their lawful business went through uninterruptedly, except by the throng; very few were outside until the Coroner's posse arrived. So far as appearances went, no visible body was so formidable in numbers as to create a consternation to passers by. Until the arrival of such posse there does not seem to have been any tumult, outcries, threatening gesticulation, or brandishing of weapons, and there was no banner raised. The utmost latitude of interpretation of which their conduct seemed susceptible, was a determination to occupy and keep possession of the City Hall for some purpose. The uniform worn by such assembly was neither new, provided for the occasion, unusual or very plainly different from that required to be worn by the new police. Reasons of necessity, economy, or a belief that this was necessary to sustain the legal claim to the old office of policeman, may as much have dictated the use of such uniform as a disorderly spirit. The clubs were not weapons of so warlike a character as to indicate, by the mere carriage of them, an intention to break the peace; besides which, their use might be lawful, in the legal purpose for which it was claimed such assembly was convened—the defense of the Street Commissioner's office. Obedience to superior officers would seem to indicate rather an orderly than a disorderly disposition, unless directed to a breach of the peace. If the foregoing views be correct, there would seem to have been room for the Jury to have put a milder face upon the appearances at

Slater v. Wood.

the meeting in question, than that of the terror and threatened breach of the peace necessary to make it illegal. Another circumstance also detracts from the inference of public alarm by the meeting in question. Its members were, for all that appears, in law and in fact, Metropolitan policemen, created such by the new act, there being no evidence to show that they had refused to accept the new office or been deprived of it. (*The People ex rel. McCune v. The Board of Police*, 19 N. Y. R., 188.) The meeting of such officers, wearing their old uniforms, only distinguishable from those required by the new board to be worn by them, upon close examination, and carrying weapons to be borne by the new force, would not be so unquestionably likely to create public dismay as to render the meeting absolutely unlawful in itself.

The instruction, therefore, that the meeting in question was an unlawful assembly in law, which was equivalent to one that no other conclusion could be drawn from the facts, except the creation of public apprehension and danger by it, appears to me to have been erroneous; it is a hazardous exercise of judicial authority in any case to pronounce a meeting as menacing or dangerous to public tranquility, and, therefore, unlawful; but particularly in a country where large public meetings are constantly held for every conceivable object, and not always in the quietest manner, and where the practical experience of a Jury taken from the community at large could best determine what was likely to produce terror or danger.

Another injustice was done to the defendant in this case, by the determination that the assembly was an unlawful one, by reason of the conduct and appearance of those constituting it. Evidence was admitted of the declarations of third persons, when the defendant was not present, as to the object of the meeting; it is very evident that these could not be evidence against the defendant of his design in convening the meeting, or any complicity by him in the purposes of those going to it, any more than the acts of the members of such an assembly could be imputed to him,

Slater v. Wood.

when disconnected with the purpose which he might be legally proved to have had in convening it. It would be a mode of making the defendant liable for acts, to which he was in no way privy, of an assembly which he might have convened for a lawful purpose, and at which he was not present to control or influence it.

The fourth and fifth of the propositions to which the learned Judge reduced his views of the application of the law to the facts of the case are apparently equally untenable; the first of those two is to the effect that the mere fact of a Coroner having once been at the office of the defendant to arrest him, imposed upon the latter the duty, upon being informed of such visit, of providing that the passage should be clear in case he returned; that proposition seems a necessary prelude to the next, which was: That even if the defendant endeavoured to secure uninterrupted access to himself by the Coroner, yet, if the latter was resisted by the force collected by the former, after a public announcement by the latter, of his purpose, to such force, the defendant was liable, although the original purpose of the meeting was legal. These propositions can only be sustained upon the principle that the defendant, having collected the force, was bound to see that it did not act illegally, or if it did, he was responsible; but no such principle is to be found in any case, and it is without any foundation in reason; no man is responsible for the misconduct of another unless he authorizes it expressly or impliedly, and no such authority is to be inferred from a request to numerous persons to meet to accomplish a legal purpose, although they afterwards act illegally when met. By such fifth proposition the defendant was made liable, although he might have done all he could to prevent a collision, or might be entirely ignorant of its imminence. The fourth proposition makes him liable, without notice of, or reason to suspect an intention to return; neither can be sustained upon any just principle.

The learned Judge also laid down another proposition to the Jury, adverse to received opinions, as to the power

of policemen and the right of the citizen to resist them in unlawful acts; which was, that the assembly of the force convened by the defendant was illegal, although its only object was to protect "the acting Street Commissioner in the possession of his office and properties against any attempts by Conover, with the assistance of the Metropolitan Police or others, to wrest that possession from him, notwithstanding such Commissioner were the lawful incumbent of the office, and in actual possession of it, and although an apprehension of a violent attempt on the part of the Metropolitan Police to force Conover into the office might have been well founded." It would have been somewhat difficult to ascertain wherein the learned Judge understood the illegality of such assembly to exist, had he not added "that there was no warrant in the law for organizing a body of men with offensive weapons, for the purpose of resisting *legally constituted protectors of the peace* from an apprehension that they are about to commit a breach of the peace." This would, however, still remain ambiguous as to whether the illegality lay in the arming with offensive weapons, or the intended resistance to legal policemen, had not that ambiguity been solved by the final statement that the proper remedy for individuals whose rights were unlawfully assailed by conservators of the peace, is to submit to the outrage and apply to courts or magistrates, subsequently, for redress. I do not, however, think the doctrine that policemen are not to be resisted, when guilty of any illegal trespass, could find favor in any courts except those of a despotic government; they certainly could not be arbiters upon an *ex parte* statement of the right to the possession of an office. Public officers may be guilty of a riot, and any one is entitled to collect a force to subdue a riot. (1 Hawk. Pl. Cr., ch. 65, § 2; Roscoe Cr. Ev., (3d ed.,) 883; 3 Burn's Just., "Riot," p. 743 note (b), Law's opinion.) The class of men composing policemen would not always be the safest with whom to trust such arbitrary power. The charge was, therefore, clearly wrong in this particular, even if the words "*and others*"

Slater v. Wood.

had been omitted, by which the learned Judge declared it illegal for a magistrate to collect men to resist a threatened violent attack by any one to oust an incumbent from the occupation of the rooms occupied for the business of his office and the possession of the muniments of his office, without warrant of law.

The injury to the plaintiff may have been the result of planned misconduct of the defendant, or of a series of unfortunate misconceptions of intentions and rights, as may be hereafter determined; but, considering the amount of injury inflicted, the amount of damages awarded does not seem to imply that the Jury were entirely satisfied it was the former. A trial in which all improper considerations may be excluded will do more justice to both parties. One important question, however, demands an expression of opinion from us before another trial, which is, whether the Coroner had a right to summon a posse in this particular case. The right of summoning a posse at all is made by the statute conferring it to depend on the public officer having the process to execute, "*finding or having reason to apprehend that resistance will be made to the execution of it.*" (2 R. S., 440, § 80.) This certainly does not intend that such public officer shall have the absolute right to determine whether resistance will be made to such execution, because that would be equivalent to allowing him to summon assistance in any case he thought proper.

There must be such a state of facts existing as would afford reasonable ground for anticipating resistance, otherwise the officer has no right to call in assistance. That question was not submitted to the Jury in this case; but it was assumed that such reasonable ground existed, notwithstanding the conflict of evidence as to the treatment of the Coroner on his first visit to the defendant's office; as the Jury were charged "that the men engaged with him in his attempt afterwards to enter the City Hall," were in the performance of a legal duty. But it is contended on the part of the defendant that even if this were a case within the statute otherwise, the Coroner has no power to

summon a posse until resisted; and the argument to sustain such a proposition is reducible to two principles: 1. At common law the Coroner could only exercise such power as the Sheriff had as process-server, and not as conservator of the peace, and no statute has conferred on him any other. 2. The Sheriff's power to summon a posse was only as conservator of the peace, in case of resistance and on final executions, and was derived exclusively from certain ancient English statutes which have not been affected by the Revised Statutes or the Code. These views, on examination, I think, will be found untenable.

The Revised Statutes, as amended in 1845, (2 R. S., 440, § 80; Laws of 1845, ch. 69,) provide for summoning the power of the county in the case of process. The words of the amendment of 1845 confer the authority to raise the power of the county, in case of apprehended resistance to the execution of process, upon the Sheriff or any public officer to whom it may have been delivered; a subsequent section (§ 84) gives the Coroner the Sheriff's power when the latter is party to the suit. The Code (§ 419) binds the Coroner to serve an order of arrest where the Sheriff is a party, the same as though it were process, and makes all its provisions applicable to Sheriffs applicable to Coroners; it also gives the Sheriff the same authority over the power of the county, in case of an order of arrest, as if it were process. (§ 185.) There is no room, therefore, for any doubt that the Code actually confers on the Coroner the same powers in serving an order of arrest as the Revised Statutes do on Sheriffs in case of process.

It is said, however, that the provision of the Revised Statutes is but a continuation of the Statute of Westminster, II, ch. 39, (2 Inst., 451,) by which, it is contended, no power is given to summon a posse upon mesne process. The answer to this is, that the Code uses the term order of arrest, about which there is no room for dispute; but even the Revised Statutes will be found to be a change of the phraseology of that statute, which requires the Sheriff to go in person "*to do execution*," which, by a refined con-

Slater v. Wood.

struction, was held to be applicable only to final process, (Cro. Jac., 419; 1 Roll. R., 388, 440; 1 Roll. Abr., 807,) the Revised Statutes provide for the execution of any process, whether it be mesne or final.

But it is more than doubtful whether such overstrained construction of the Statute of Westminster has not since been overruled. There never was any doubt as to the power of the Sheriff to summon a posse to execute any process *after resistance*, (3 Inst., 161; 3 Hen. VII, Year Book, 1,) and his power to summon one, in any case, was always held to be at common law and not derived from the Statute of Westminster. (1 Inst., 193; Imp. Shff., 143.) Centuries ago it was held that the Sheriff could not set up an escape as a defense, when a prisoner, held on mesne process, was brought into Court on a habeas corpus, (*Crompton v. Ward*, 1 Stra., 433,) and the reason assigned by PRATT, Ch. J., was that he had a right to the power of the county. But the right and duty of the Sheriff to employ the power of the county, if necessary, was fully settled in *Howden v. Standish*, (6 Com. B. R., 520,) when it was fairly presented; and it was determined that although an escape by rescue was a defense on mesne process, where he had no notice of such intent, yet when notified of such intent, he was bound to employ the power of the county to overcome resistance. And such the Revisers understood to be the law, as in their note to 1 Rev. Stat., 440, § 80, they state that 1 Rev. L., 423, § 11, was varied, to declare the full extent of the power as it exists.

The judgments of the Metropolitan Police Commissioners, depriving certain officers of their places, were admitted notwithstanding objection, without due proof of personal service of notice of the charges against the officers, with the time and place of their proposed trial, so as to confer jurisdiction; and as they were admitted notwithstanding an objection, the exception thereto was well taken.

For these reasons, I think, the judgment should be reversed and a new trial awarded, with costs to abide the event.

Slater v. Wood.

WHITE, J. One of the most important questions—perhaps the most important—in this case, respects the character of the assembly convoked by the defendant on the 16th of June, 1857, at the City Hall, for the purpose, as alleged by him, of protecting Mr. Turner in the possession of the Street Commissioner's office; and upon the occurrence of a collision between which assemblage and the Metropolitan Police, the plaintiff received the injury for which he brought this suit. That assembly is said by the plaintiff to have been an unlawful one, and the Judge declared it to be so, in his charge to the Jury; and, considering its peculiar spirit and composition, and all the circumstances of the time and occasion, I think the Judge charged correctly.

Previous to the passage of the act of April 15th, 1857, establishing a Metropolitan Police District, to consist of the counties of New York, Kings, Richmond and Westchester, the police force of the City of New York, comprising some eleven or twelve hundred men and officers, were known as the "Municipal Police." Distributed and provided with station houses in appropriate districts throughout the city, they were uniformed, armed with clubs, organized and officered in sections or companies, with captains, lieutenants and sergeants, for the more efficient exercise of their functions. The Mayor was the head, and, with the City Judge and the Recorder, formed a Board of Commissioners to prescribe rules for the general government of the department.

In April, 1857, a change was made by the Legislature of the State. By the act then passed, (and which subsequently was adjudged constitutional, by the court of last resort,) the Metropolitan Police District, comprising the counties above mentioned, was established, and a police force was directed to be raised in each county, whose authority and duties should extend through the whole district. The act also created a Board of Commissioners for the government of the force thus authorized, which was to consist of five commissioners, to be appointed by the Gov-

Slater v. Wood.

ernor, with the consent of the Senate. The Mayors of the cities of New York and Brooklyn were also to be, *ex officio*, members of this board. This act took effect on April 15th, 1857. By its provisions all former acts and provisions of law inconsistent with it were repealed, and the new Board of Commissioners became, upon their first meeting, vested with all the powers and authority conferred by it. That first meeting was held on April 23d, 1857, and at that instant all the functions and authority of the old board, and of the Mayor as head of the Police Department, utterly ceased.

The defendant, however, being then Mayor of New York, refused to submit to this consequence. He denounced the law as unconstitutional, and openly set himself in actual physical hostility to it. He grasped the authority which the law declared to be now illegal in his hands, maintained the old organization in defiance of the supreme power of the State which had dissolved it, and announced his purpose to compel obedience to his commands, by the infliction of penalties upon such members of the old force as should violate his orders, or hesitate to acknowledge him as their head and superior officer.

On April 22d, 1857, he summoned all the captains of the old force, some twenty-two in number, and addressing them in a body, declaring those purposes, he said, among other things, after stating that he had commenced legal proceedings to test the constitutionality of the law :

"I have sent for you to say that I am still your superior officer, and you must recognize no other, as I shall hold any of you who may err from my orders to the strictest accountability. * * * * You are to obey no other orders but mine until the Court decides the law to be constitutional. * * * * I desire you forthwith to communicate my decision to the men under your commands, and say to them that this order issues from the head of the Department. I hope you will bring all your men to the most rigid accountability who shall dare violate my command. I shall revive many 'orders'

Slater v. Wood.

“that have become dead letters, and insist on their fulfillment.”

Influenced by the declarations and appeal thus made to them, the great majority of the old police confederated with the defendant in his revolt against the law; and continued in their organized resistance and violation of it, maintaining possession of all the police property and station houses of the city, and exercising all the functions and authority of policemen, under the defendant as their head, until after the happening of the events which gave rise to the subject of the present suit.

In the meanwhile, the Board of Commissioners of the Metropolitan Police had proceeded under the law of April, 1857, to discharge the duties which it imposed upon them. They had established a police force, of which some members of the old body who had declined to follow the lead of the defendant, formed a part; and the spectacle was presented, in this great and popular city, of two opposing or rival bodies of men organized and armed within its limits, each claiming as against the other to be the rightful and exclusive possessor of the important powers and privileges of public conservators of the peace, and each regarding the other as usurpers or unlawful intruders into office. There is, in the testimony in the case before us, abundant evidence of the jealousies and ill feeling necessarily generated by this condition of things between these two opposing bodies; and it required no extraordinary sagacity or discernment to foresee that by these conflicting claims the public peace could not long remain undisturbed, and that sooner or later, just such violence and collisions as have led to the present action must inevitably ensue; and it is also most manifest that to the defendant, who, without justification or color of law, had entered upon the illegal course above stated, must exclusively belong the responsibility for all its necessary consequences.

In June, 1857, a controversy arose respecting the title to the office of Street Commissioner of the City of New York. Daniel D. Conover claimed to be the lawful

Slater v. Wood.

incumbent, and entitled to the possession of the office with all its records and appurtenances, under color of appointment by the Governor of the State. On the other side, Charles Turner, who was the deputy of the former commissioner, just deceased, claimed to be the lawful holder of the office, as successor of the deceased commissioner, until a new appointment should be made in the manner prescribed by the charter of the city. For some two or three days previous to June 16th, 1857, each claimant sought to obtain exclusive possession or control of the office or rooms in the Hall of Records in which the business of the Street Commissioner's Department was transacted. It was subsequently determined, upon legal proceedings, that Mr. Turner was the rightful incumbent; but at this time there was a personal struggle in progress between the parties, for the possession of the rooms; and Conover had been forcibly ejected from them by Municipal policemen acting under the orders of the defendant; and it was said to be apprehended that the Metropolitan Police might, on the 16th of June, forcibly restore Conover, or put him again in the occupation or possession of those rooms.

In the anticipation, the defendant alleges, of such an attempt, and with the design to prevent it, he collected within and around the City Hall, during the evening or night of the 15th, and in the forenoon of the 16th of June, a formidable force of some six or seven hundred members of the Municipal Police, all, or nearly all, fully uniformed and equipped. They filled the City Hall, partially closed the gates, and placed strong guards at its entrances, and were ordered to allow none to enter but certain persons designated, the defendant, during the whole day, remaining in his office within the building. This is the assembly which it is alleged by the plaintiff, and denied by the defendant, was an unlawful one. No attempt was made that day, or at any other time, by the Metropolitan Police, to reinstate Mr. Conover in the possession of the Street Commissioner's office.

Slater v. Wood.

An order for the arrest of the defendant and other persons, including the Sheriff, had been granted that day in an action brought against them by Mr. Conover, for his forcible ejection above mentioned. The Coroner of the city, in attempting to serve the order, during the forenoon of that day, upon the defendant, the Mayor, believed that he was willfully resisted, and applied for and obtained a body of fifty Metropolitan policemen, as a posse, to aid him in executing the order. On attempting to enter the City Hall for that purpose, the Coroner and his posse were resisted by the Municipal Police congregated there by the defendant, and in the violent conflict, of but a few moments duration, which ensued, the Coroner and the Metropolitan Police were beaten back, and the plaintiff and several others of the Metropolitan force were badly injured.

On the trial the plaintiff insisted, and the defendant denied, that this assembly of Municipal policemen was convoked by the defendant for the purpose of resisting any attempts that might be made to arrest him. The testimony was conflicting on this point; but as the Judge charged the Jury, as matter of law, that, in every aspect of the question which the case might present, the assembly was an unlawful one, the propriety of this charge must be considered upon the defendant's ground, namely, that he had assembled them only to protect Mr. Turner in the possession of the Street Commissioner's office.

But, admitting all that, the unlawful character of the assembly still remained. It was a body of men maintaining, in defiance of law, an official organization and usurping an official authority in the community, of a most dangerous character when illegal and unwarranted. Wherever they moved and whatever they did, in this unlawful combination, there was presented on their front this primary characteristic of resistance to and contempt for lawful authority. They bore this about with them, and could nowhere be assembled, in their usurped capacity of a police organization, without being an offense to the law, and a scandal to the peace and good order of society. And the

Slater v. Wood.

defendant could not convoke such a body, could not wield this organized power, which he sought to hold together in disregard of the mandates of the law, without bearing, himself, the principal burthen of the transgression.

In all cases it is justifiable, and in some even commendable, to take legal proceedings to test the constitutionality of a law regularly enacted. But such proceedings bear no resemblance to the acts of the defendant and his confederates in the instance before us. It is true that he appealed to the Courts for their judgment upon the character of the law which he deemed offensive; but, at the same time, he moved in the track of disorder and sedition *pari passu* with the legal proceedings which he instituted.

In a case like this, I think it is important that we should declare that strict obedience to law, and especially to law involving the security of social order, is a duty that, under institutions like ours, admits of no exception. There are so many safeguards against oppression in our system of society, so many peaceful and legal modes provided for redress of any possible grievance, so many periodical opportunities secured to every citizen for the most radical and yet peaceful reconstructions and reformation of whatever may be deemed vicious or inequitable, even in organic law, that no excuse should prevail among us for anything like force or violence, for anything savoring of that revolutionary anarchy, which, under other forms of government, is the dangerous, but sometimes the only resort for relief from intolerable wrong.

I think, therefore, upon the grounds which I have above stated, that the assembly in question, convoked by the defendant at the City Hall, was an illegal body; and that whenever it was convoked, as in the present instance, for the employment of its organization as a police force, not only without warrant of law, but contrary to the provisions of law, and in defiance of the duly constituted authorities, it was an unlawful assembly. And if it should be deemed necessary, in order to give to it the character of an unlawful assembly, in the common law acceptation

Slater v. Wood.

of that term, which requires that it should be shown to have been attended with circumstances calculated to excite alarm, to endanger the public peace, and raise fears and jealousies among the citizens. (1 Hawk. P. C., ch. 65, § 9.) I think that it appears, from the testimony in the case, to have been attended by all those circumstances. Much excitement existed previous to its convocation, caused by the attitude of resistance to the law, assumed by the defendant and the Municipal Police. This excitement was increased by the contest respecting the Street Commissioner's office, in which the police on both sides became involved; and when, on the 16th of June, the defendant filled the City Hall with this unprecedentedly numerous assemblage of the policemen maintained by him, in my estimate of the successive facts disclosed by the testimony, I think that all the conditions of the common law definition of an unlawful assembly were fulfilled. And none appeared to be more impressed with a conviction that such circumstances of terror existed on that day as would endanger the public peace, and raise fears and jealousies among the citizens, than the defendant and the Metropolitan Police Commissioners.

The former, on the afternoon of the 16th of June, issued a proclamation "TO THE PEOPLE OF NEW YORK," in which he says :

"As if the usurpers of your municipal rights were not content with act after act of unjustifiable, illegal and tyrannical enactments, they have this day attempted to take life in an effort to degrade you through my person. But for the efforts of myself and those under my command, your streets would have been deluged with blood, and your property destroyed. In this emergency, and at this crisis in the government of the city, I call upon you to remain calm, to observe the laws, to respect persons and property, and to avoid excitement and collision."

The President of the Metropolitan Board of Police also issued a proclamation at the same time, and on the same subject, in which, after referring to "the unusual excite-

Slater v. Wood.

ment prevailing in the city," he says that, "the peace of the city and the protection of property require the promptest and most decided measures," and that, "hundreds of substantial citizens had offered their services as special policemen, and a sufficient number of them had been accepted."

On the whole testimony there appears to me to have been nothing wanting to have constituted that assembly an unlawful one.

No defense, or even palliation of the defendant's proceedings, nor of the conduct of the old police force which adhered to him, can be predicated upon the fact that the law of April 15th, 1857, enacted that the police then existing in New York "shall hold office and do duty under the provisions of this act." Those policemen spurned that act; they denied its validity, disclaimed all connection with it, or that they acted under it, and, in fact, did no duty under it. The terms of the act are in the conjunctive, "that they shall hold office *and* do duty under it." They could not claim to hold the office while withholding the duty. But, independent of that consideration, it would be a manifest paradox to say that those men could deny and resist the law, and at the same time uphold and claim protection under it. They repudiated the law, refused to act, and did not act under it, and could not, while thus resisting it, claim that it conferred upon them any function, authority or protection.

But, notwithstanding that I hold the views which I have above expressed, respecting the character of the assembly convened by the defendant, I concur in the conclusions of the Court upon the other points discussed, and think that a new trial should be ordered.

All the Justices concurred in granting a new trial.

JOHN MOFFAT, Plaintiff and Respondent, v. THOMAS
W. STRONG, Defendant and Appellant.

1. A tenant being put out of possession, may defend an action for the rent, by proof that he was ousted by one having a title paramount to that of the landlord, although the ouster was not by virtue of a judgment, decree or any legal process; such tenant taking the burden of proof that he acted in good faith, and that such title was in fact paramount.
2. It is not an unqualified rule that a tenant, put in possession by his lessor, may not deny the title of the latter. The rule is, that a tenant may not accept possession from a lessor, hold and enjoy under the demise, and then refuse to pay the rent, or refuse to yield the possession to his lessor at the termination of his lease, and justify such refusal in either case, by alleging or proving that the lessor, under whom he has had such enjoyment, had in fact no title. But eviction under title paramount is a defense, whether such title was in the evictor before the lease, or was acquired by him after the lease was executed.
3. If such eviction or ouster is from a part of the demised premises, it entitles the tenant to an apportionment of the rent, and an abatement according to the relative value of the part from which he is evicted.
4. Leases for a term not exceeding three years are not within the statute, (1 R. S., 738, § 140,) which declares that no covenant shall be implied in any conveyance of real estate.
5. The implied covenant for quiet enjoyment which arises upon such a lease is broken by an expulsion, by one having paramount title, without any judgment or decree.
6. The defendant was tenant of a lot of land, and buildings thereon, under a lease from the plaintiff, for the term of three years. The owner of the adjoining lot was, in fact, the owner of a strip of land within and along the side of the demised premises, and on which, in part, the wall of the buildings rested; and he notified the defendant of the encroachment, and that he was about to excavate under the wall, and required him to remove the wall. The defendant gave written notice of this claim to the plaintiff, and required him to defend his rights as he might be advised, and notified him that he should hold him responsible for any damages sustained; but the plaintiff taking no measures to protect the wall or prevent its removal, and the excavation being commenced, the defendant, in view of the danger caused by the undermining of the wall, took it down and rebuilt it on the line of the plaintiff's lot. In the plaintiff's action to recover the rent;
Held, 1st. That these facts constituted such an eviction by paramount title, from a part of the demised premises, as to suspend a portion of the rent, and were available as a defense thereto.

Moffat v. Strong.

2d. That they were also a breach of the implied covenant for quiet enjoyment, and were available as grounds for a counterclaim to the rent.

(Before BOSWORTH, Ch. J., WOODRUFF and WHITE, J. J.)

Heard November 7, 1861; decided December 28, 1861.

APPEAL from a judgment in favor of the plaintiff, on a verdict recovered upon a trial before Mr. Justice ROBERTSON and a Jury, on the 12th of April, 1861.

The facts of the case are fully stated in the opinion of the Court.

Walter Rutherford, for the defendant, (appellant.)

I. The ruling of the Judge, excluding all evidence of the facts set up by the amended answer, is equivalent to a decision in favor of plaintiff, upon demurrer to the answer, and raises the simple question: do the facts set up constitute a defense?

II. There is an implied covenant of quiet enjoyment of "the lot with the buildings thereon." (*Whitney v. Lewis*, 21 Wend., 136; *Giles v. Comstock*, 4 Comstock, 270; *Mayor of New York v. Mabie*, 3 Kern., 151; *Vernam v. Smith*, 15 N. Y., 332; *La Farge v. Mansfield*, 31 Barb., 345; 33 Id., 404; 24 Id., 180; *N. Y. Ice Co. v. N. W. Ins. Co.*, 21 How., 296; *Gilbert on Rents*, 135.)

III. The object of this covenant is to protect from lawful claims by third parties having title paramount, and its scope is equally extensive as that of an express covenant, which extends not only to an actual eviction, but *disturbance* of the possession of the covenantee. (*Kortz v. Carpenter*, 5 Johns., 120; 8 Coke, 89; 2 Comyn's Rep. Anon., 228; *Waldron v. McCarty*, 3 Johns., 471; 1 Lev., 301; 2 Saunders, 181, b.; *Dyett v. Pendleton*, 8 Cowen, 727; *Foster v. Pierson*, 4 Term R., 617; see also, 2 E. D. Smith, 206.)

IV. The defendant was evicted by paramount title and the necessity of the case. The wall, being undermined, was taken down and rebuilt, and during that time he was deprived of the enjoyment of the whole of the demised "buildings," and during the whole balance of the term was evicted of so much of said premises as encroached on Myers' lot.

Moffat v. Strong.

Such eviction discharges the whole rent, and there can be no apportionment. (*Dyett v. Pendleton*, 8 Cow., 727.)

V. All legal and equitable rights of parties in relation to the same subject matter, and arising therefrom, should be settled in one action; and a landlord, seeking to enforce his rights, now stands in the same position as any other litigant. Damages, liquidated or unliquidated, may be recovered against him for a breach of his covenants in the lease he sues upon equally as well as on a breach of any other contract. (*Mayor of New York v. Mabie*, 3 Kern., 154; *Dyett v. Pendleton*, 8 Cow., 727; *Blair v. Claxton*, 18 N. Y. R., 534; *Id.*, 583; *Platt on Covenants*, 312; *Peck v. Hiler*, 24 Barb., 178; *Bank of Toronto v. Hunter*, 20 How., 298; *Mayor of New York v. Parker Vein Steamship*, 21 How. Pr., 289; *New York Ice Co. v. North Western Ins. Co.*, *Id.*, 299; *Phillips v. Gorham*, 17 N. Y. R., 270.)

Lyon for the plaintiff, (respondent.)

The answer did not set up an eviction by the landlord, or through his agency, or under a recovery by a third party under a paramount title. The fact that Myers, under his claim of title, was excavating the foundations of his building, whereby the plaintiff's was endangered, and that the removal and reconstruction of the wall was a necessity to prevent such damage and danger, and that such disturbance was occasioned by the paramount title of Myers to this strip of land, which was not owned by the plaintiff, is no statement of a legal eviction. It is an averment in effect that Myers was about to commit a trespass, for which the landlord was in no manner responsible, and that to prevent the consequence of this trespass, defendant himself pulled down his landlord's wall, surrendered ground of which his landlord had put him in possession, and now seeks to recover the cost and damages of his own act.

The additional averment, that Myers owned the strip does not help the pleading, for, taken as a whole, it admits the tenant in actual possession under his landlord, and that, while in such possession, he took down the wall, upon

Moffat v. Strong.

the demand of Myers, and while Myers was taking forcible possession of premises then in the tenant's occupation.

If such a defense can be tolerated, then every tenant can defend himself from the payment of rent upon his naked averment that his landlord's title is in a stranger, and can compel his landlord to prove his title upon the trial for the rent. If the defendant could avail himself of this defense, he could so with equal success had he surrendered the whole premises to Myers upon Myers' naked claim of ownership, unsupported by any recovery. (Taylor's Landlord and Tenant, section 378.)

No broader definition of an eviction has ever been given than in the opinion of Mr. Justice SPENCER, in the case of *Dyett v. Pendleton*, (8 Cow., on page 730.)

Under this it cannot be pretended that the defendant has stated in his answer a legal eviction.

Assuming that the answer does not show a case of legal eviction by paramount title, and conceding as true, all of its statements, the injury stated is not one for which the tenant can recover. Because,

1. The lease itself, in which the tenant is to do all repairs, ordinary and extraordinary, contemplates that the tenant was to provide for any such contingency as did happen; and,

2. Independent of this special clause, the law imposed upon the tenant this duty, and not upon the landlord. (*Howard v. Dookittle*, 3 Duer, 464.)

BY THE COURT—WOODRUFF, J. The action is brought by the plaintiff as lessor of the lot and buildings known as No. 371, in Broadway, in the City of New York, against the defendant, as the assignee of the lease, to recover one quarter's rent, accruing while the defendant is averred to have been in possession, to wit, on the 1st day of February, 1860, to the amount of \$1,375.

The defendant, by his answer, admitted the lease to his assignor, (one Kirker,) the assignment to himself, his entry and possession of the premises, as assignee, but in trust for

the payment of the debts of Kirker, who had become insolvent.

The answer then proceeded to set up what was claimed to be a breach of the implied covenant for quiet enjoyment, by the acts of one Myers, the owner of the adjoining lot, (No. 373,) who, as the answer alleged, was the actual owner of a strip of land from five to eight and one-quarter inches in width, extending from the rear of the lot, sixty feet in length, towards Broadway, whereon the north wall of the demised premises in part rested. On the trial the presiding Justice, on the objection of the plaintiff's counsel, having ruled that the facts alleged in the answer constituted no defense, excluded all evidence offered by the defendant in support thereof. Thereupon the defendant, by leave of the Court, amended his answer, and offered to prove the facts alleged in such answer, as amended; but, on objection, all evidence was excluded, on the ground that if the facts were proven, they constitute no defense to the action.

On the part of the defendant it is claimed that the facts alleged in the answer, as amended, constitute an eviction of the tenant from a part of demised premises, under paramount title, and so operated as a suspension of a part of the rent. They were further claimed to constitute a breach of a covenant for quiet enjoyment implied in the demise, and to entitle the defendant to damages by way of counterclaim.

Though inartificially framed, the answer, as amended, in substance avers: That the defendant being in the possession of the demised premises, Myers, who was the owner of the lot next adjoining, including a portion of the demised premises, that is to say, of the strip of land above mentioned, whereon the north wall of the demised building rested, notified the defendant of the encroachment upon his lot, and of his title to said strip of land, and that he was about to excavate and build upon his lot, and required the defendant to remove the said wall therefrom. That the defendant thereupon gave written notice to the plaintiff

Moffat v. Strong.

of Myers' claim, and of his requirement that the wall be removed, and demanded that the plaintiff take such measures as he might be advised, to defend his rights and protect the premises, and notified him that the defendant would hold him responsible for all expenses caused by a removal of the wall, and for all loss and injury to his business, for any eviction by the plaintiff or others from any portion of the demised premises. That the plaintiff wholly disregarded such notice, and neglected to shore up the wall or to claim or enforce any right to have it remain where it stood. That Myers proceeded to excavate for the foundation of his building, and the said north wall was in danger and would have fallen as such excavation proceeded, which would have occasioned the fall of the building itself, the destruction of a large amount of the defendant's property, and possible loss of life; and the removal and reconstruction of such wall was a necessity to prevent such damage and danger; and the defendant, to prevent the fall of the building, did cause the floors to be supported, and such north wall to be taken down and rebuilt on the line of the plaintiff's lot.

That such disturbance of the defendant's quiet enjoyment of the said premises was occasioned by the paramount title of Myers, in and to the said strip of land encroached upon by the said wall and which was not owned by the plaintiff, which paramount title existed before and at the time of such disturbance, and the defendant was evicted, by reason thereof and of such excavation, from the possession of so much of the demised premises as stood upon the said strip of land, and from the quiet use and enjoyment of all the demised premises.

I. The question we propose first to consider is, whether the facts constitute an eviction from a part of the demised premises, entitling the defendant to an apportionment of the rent and an abatement according to the relative value of the part from which he is evicted.

That if the facts constitute an eviction, such a consequence follows, we do not understand the plaintiff to deny.

An eviction by the landlord from either the whole or a part of the demised premises suspends the whole rent. An eviction by another under paramount title, if of the whole, suspends the whole rent; if of a part of the demised premises, it entitles the defendant to an apportionment.

The answer distinctly avers a paramount title in Myers to the strip of land which it alleges formed a part of the demised premises. This must be taken to be admitted for the purposes of the appeal; since otherwise, if material, the defendant should have been permitted to prove it.

The defendant yielded, under the pressure of danger that the building would be thrown down, to Myers' paramount title, and so lost the possession of a part of the demised premises. This is a view of the answer as favorable to the plaintiff as the allegations will permit. He gave full notice to the plaintiff, and at length yielded the possession, and his so yielding must be taken to have been in good faith, compelled by the alleged necessity, else evidence of this should have been received to be submitted to the Jury.

The question is, therefore, reduced to this: Can the dispossession of a tenant, by a third person having a title paramount to the lessor, amount to an eviction, unless it be a dispossession by virtue of a judgment at law or decree in equity? or in the alternative, must the tenant resist the true owner and defend the possession, by force if need be, at his peril until, by some judgment or legal process, he is ousted?

The plaintiff here insists that the tenant is bound to maintain his possession and that of his landlord, until he is dispossessed by virtue of such judgment or decree; and that nothing less than this will constitute eviction under paramount title suspending the rent or excusing the tenant from its payment, however true it be, that such paramount title is in the disseisor, and however ready the tenant is to take the burden of establishing it.

This view of the duty of the tenant calls upon him to resist the lawful demands of one who has a perfect legal

Moffat v. Strong.

right to enter the premises. In this sense, it calls upon him to do what is illegal.

It subjects him to damages in favor of the true owner.

It places him in a situation in which, if by artifice or accident the true owner can obtain peaceable possession, the tenant must still pay rent to his lessor although he cannot recover possession by action against such owner.

And aside from the provisions of the statutes against forcible entry and detainer, if by any force or compulsion the owner can obtain actual possession, the tenant is remediless, for he can maintain no action to recover possession against the owner, and yet he must pay the rent. And trespass for a tortious entry upon the premises will wholly fail to protect the tenant in the enjoyment of the premises or compensate him in damages for the disturbance of that enjoyment, for to his action against the owner, the plea of title will be a conclusive bar.

And, at the least, it requires the tenant to engage in a litigation which he knows to be futile, and as the case may be, when the lessor will take no measures for his protection, with the certain knowledge that judgment must be rendered against him, and he be so compelled to yield possession and pay costs and damages for withholding it.

This claim respecting the duty of a tenant seems harsh, and to my mind unreasonable, and yet if it be law, "the perfection of reason" may not be contemned or disregarded.

Good faith, or the absence of collusion with a third person to deprive the landlord of his possession, should, no doubt, be an essential requisite to the eviction under alleged paramount title; but if in good faith the tenant yields to the better title, and takes the burthen and hazard of proving, when called upon by his landlord, that such title is in fact paramount, there would seem no sufficient reason for requiring him to bear all the hazards of an illegal resistance to the claim of the real owner, or the burthen of a litigation with him, knowing that he must be defeated. Nor does it seem altogether reasonable to

require the tenant to pay rent for what he has not enjoyed; to the enjoyment of which he had no right, and to which his lessor had no title.

The argument which denies the right of the tenant to defend, unless dispossessed by legal process or judgment, is mainly urged as resulting from the rule that a tenant who is put into the possession of the demised premises by his lessor, may not deny the title of the latter; or, in the more concise but by far too comprehensive words usually employed, "a tenant cannot deny his landlord's title."

The rule itself has numerous qualifications, and the right to prove eviction under paramount title, by virtue of a judgment, of itself shows that where there is such an eviction the rule has no application.

At the common law no such rule existed. The plea "*Nil habuit in tenementis*" was a good defense to an action for the rent, or to an avowry in replevin for goods taken as a distress. (*Gill v. Glasse*, Yeiv., 227; *S. C.*, Oro. Jac., 312; *Aylet v. Williams*, 3 Lev., 193; *Skinner*, 624; *Coke Lit.*, 47, b.; *Jordan v. Twells*, Rep. tem. Hardwicke, 171; Note to *Doe v. Oliver*, 2 Smith Lead. Ca., 417, 4 Am. ed.)

It is true that when the demise to the tenant was by deed indented, the tenant could not avail himself of that plea, but the reason was not because a tenant could not deny his landlord's title, but because in such case he was held to have, by the indenture, conclusively admitted the title. He was estopped by the indenture either to plead or prove the contrary, not forbidden by any rule existing aside from such conclusive admission as the form of his obligation imported. Hence, when the demise was by deed poll, or by parol, (whether written or oral,) the plea was good. (*Palmer v. Ekins*, 2 Ld. Raym., 1550, and cases last above cited.)

No doubt the rule referred to originated in the statute of 11 Geo. II, ch. 19, which, by several of its provisions, operated to place tenants under more stringent obligations to their landlords, and protected the latter against fraud and collusion, and two of them bore upon the rule in

Moffat v. Strong.

question. Some of the provisions of that statute were very early enacted in this State, and have ever since been continued in force. (Act of 1788; 2 Greenl. Ed. of Statutes, p. 115, § 28, &c.; 1 R. L. of 1813, pp. 143, 525, § 25; 1 R. S., pp. 739, [§ 146,] 744, § 3.)

Section eleven declared that an attornment to a stranger should be "absolutely null and void to all intents and purposes whatsoever," and the possession of the landlord * * should not be deemed changed, altered or affected thereby; "provided always that nothing herein contained shall extend to vacate or affect any attornment made pursuant to, or in consequence of, some judgment at law, or decree or order of a court of equity, or made with the privity and consent of the landlord, * * or to any mortgage after the mortgage is become forfeited."

And section twenty-two declared that it should "be lawful to and for all defendants in replevin to avow and make conveyance generally, that the plaintiff in replevin, or other tenant of the lands and tenements whereon such distress was made, *enjoyed the same under* a grant or demise at such a certain rent during the term wherein the rent distrained for incurred, which rent was then and still remains due; * * without further setting forth the grant, tenure, demise or title of such landlord." * * (Statutes at Large, Pickering's edition, vol. 17, pp. 187, 191.) And in *Sullivan v. Stradling*, (2 Wils., 208,) the effect of this last named section of the statute is fully considered, and it is held that in the single case of replevin for goods taken by distress where there has been an enjoyment by the tenant under the demise, the landlord was not only not bound to set out or prove his title, but the tenant could not, by plea to the avowry, compel him to take issue upon such title nor bring the title in question. But it is stated to have been admitted on both sides that "*Nil habuit in tenementis*" is a good plea in debt or covenant for rent upon a lease not indented. And, as already remarked, the reason why it is not a good plea when the action is on an indenture, is not that the tenant may not deny his landlord's title, but that having

Moffat v. Strong.

admitted such title by an instrument which is conclusive as an estoppel, he is precluded thereby.

Another section of the same statute (§ 14) gave an action to the landlord for a reasonable satisfaction for lands held or occupied by the defendant, and if on the trial an agreement or demise (not by deed) appeared, the rent therein reserved should be taken as the *quantum* of damages to be recovered.

And, while on the one hand the plea "*Nil habuit in tenementis*" had been justified and sustained on the ground, among others, that if true there was no *quid pro quo* for the undertaking of the tenant to pay rent, so on the other, the equitable doctrine began now to be recognized by the Courts, founded mainly upon the above mentioned statute, that where the tenant had enjoyed the premises under and by virtue of a demise from the plaintiff, he ought not to be permitted to refuse the payment of rent on the mere ground that there is an outstanding title in some third person; and upon the like equitable view of the subject, such a tenant who has been put into possession by his landlord and has enjoyed the same, shall not, when his term is ended, by the expiration thereof, or by entry for condition broken, be permitted to hold over and resist an ejectment for the recovery of possession by his landlord, by the mere allegation and proof that the plaintiff had not the title when the defendant so entered under him.

And to this effect is a long course of decisions from the case of *Sullivan v. Stradling* down, both in England and this country. See *Doe v. Pegge*, (1 T. R., 766,) *Doe v. Mills*, (2 Ad. & Ellis, 17,) *Doe v. Baytup*, (3 Id., 188,) *Doe v. Fuller*, (1 Tyrw. & Gr., 17,) *Doe v. Symthe*, (4 M. & S., 347,) which were actions of ejectment; and *Cooke v. Loxley*, (5 T. R., 4,) *Lewis v. Willis*, (1 Wils., 314,) *Agar v. Young*, (1 Carr. & Mar., 78,) *Fleming v. Gooding*, (4 M. & Scott, 455; S. C., 10 Bing., 549,) *Rennie v. Robinson*, (1 Bing., 147,) which were actions for use and occupation; and *Parry v. House*, (Holt., 489,) *Cooper v. Blandy*, (4 M. & Scott, 562,) which were actions of replevin for goods taken

Moffat v. Strong.

as a distress for rent in arrear. And in this State, to the like effect, are *Jackson v. Harder*, (4 J. R., 203,) ejectment; *Jackson v. Rowland*, (6 Wend., 670,) ejectment; *Lawrence v. Miller*, (1 Sandf., 550,) *Kenada v. Gardner*, 3 Barb. S. O. R., 589; *Nellis v. Lathrop*, (22 Wend., 121.)

This shows, I think, the origin of the rule in the statute referred to, and in the equitable application of its principles; and while the right of the defendant to defend, by a mere impeachment of his landlord title, is greatly modified, it is nevertheless clear that the rule is much more narrow and limited than the broad generality of the terms in which it is given would import. It amounts to this: A tenant may not accept possession from a lessor, hold and enjoy under the demise, and then refuse to pay the rent, nor refuse to yield the possession to his lessor at the termination of his lease, and justify such refusal, in either case, by alleging or proving that the lessor under whom he has had such enjoyment had in fact no title.

But this is far short of the proposition that when his holding and occupation under the demise have ceased, however that holding or occupation was terminated, and whether it has ceased in respect to the whole or a part of the demised premises, he may not resist the collection of rent alleged to have thereafter accrued, by proof that his lessor had no title, and his (the tenant's) possession was lost for that cause.

That where the title of the lessor has expired since the demise, the tenant may allege and prove that fact, and successfully resist the payment of rent or the recovery of possession, is abundantly settled both in England and here. (*England v. Slade*, (ejectment,) 4 T. R., 682; *Doe v. Ramsbottom*, (ejectment,) 3 M. & S., 516; *Gravenor v. Woodhouse*, replevin,) 1 Bing., 38.)

In *Rogers v. Pitcher*, (6 Taunt., 202,) the rule received this further limitation. The plaintiff in replevin had paid rent to the defendant, and so recognized the existence of the relation to him of tenant, and yet she was allowed to show that such defendant had not title at the time of such

Moffat v. Strong.

payment; the plaintiff had been put into possession by another lessor, and was permitted to show that the attornment to the defendant was made under circumstances which did not warrant it, and that he had not the title. In *Hopcraft v. Keyes*, (replevin, 9 Bing., 613,) and in *Brook v. Biggs*, (use and occupation, 2 Bing. N. O., 572,) the defendant was permitted to show that he entered under the holders of the legal title. That the plaintiff obtained an agreement for a lease, and the defendant thereafter paid rent to him, but that subsequently, by reason of his breach of the agreement, his title to the rent failed, the agreement being put an end to. So in *Downs v. Cooper*, (2 Ad. & Ellis, N. S., 256, replevin,) the defense was that the landlord and a third person, claiming title, had submitted the question of title to a barrister, whose opinion was in favor of the claimant: in *Doe v. Watson*, (2 Stark., 230,) that the landlord had sold: in *Doe v. Seaton*, (2 Cr., Mees. & Ros., 728,) that the landlord's title had expired; *S. P. Neave v. Moss*, (1 Bing., 360,) *Doe v. Whitroe*, D. & R., N. P., 1.) And see *Franklin v. Carter*, (1 Mann. Gr. & Scott, S. O., 9 Jur., 874,) in which, although the claimant had recovered in ejectment against the lessor, that only made the proof of paramount title in the claimant more easy; the case still shows that the tenant could allege and prove title in the claimant. (See also *Den v. Ashmore*, 2 Zabriskie N. J. R., 261.)

Similar cases have arisen and been decided in this State, showing that when the landlord's title has expired this will be a defense to the tenant. (*Jackson v. Rowland*, 6 Wend., 670; *Lawrence v. Miller*, 1 Sandf., 550; *Evertson v. Sawyer*, 2 Wend., 512; *Nellis v. Lathrop*, 22 Id., 121; *Giles v. Comstock*, 4 Comst., 276.)

Other cases in England and in this and other States of the United States, show that where the lessor had given a mortgage before or after the demise, the title of the mortgagee may be set up as a defense by the tenant, both to an ejectment and to a claim for rent. The entry of the mortgagee and payment of rent to him is a good defense.

Moffat v. Strong.

(*Doe v. Edwards*, 5 Barn. & Ad., 1065; *Moss v. Gallimore et al.*, Doug., 279, and notes thereto in 1 Smith's Lead. Ca., 595, [310]; *Doe v. Barton et al.*, 11 Ad. & El., 307; *Waddilove v. Barnett*, 2 Bing. N. C., 538; *Pope v. Biggs*, 9 Barn. & Cres., 245; *Welch v. Adams*, 1 Metc., 494; *Magill v. Hinsdale*, 6 Conn., 465; *Stone v. Patterson*, 19 Pick., 476; *Jones v. Clark*, 20 J. R., 52; *Simers v. Saltus*, 3 Denio, 214.)

Without reviewing these cases in detail, a reference to them will show that the rule referred to has the limitations above suggested, and that it is not an arbitrary and unqualified rule which forbids the tenant who has lost the enjoyment of the premises, or who has failed to enjoy under the demise, to show that the landlord is not entitled to rent. And it will be material hereafter also to notice that these cases also show that a tenant is not inevitably compelled to wait for legal process or judgment as his sole protection, notwithstanding the technical definition of the word "eviction" to be presently stated.

Thus, in *Gravenor v. Woodhouse*, (1 Bing., 38,) the court say, (while recognizing the rule that a tenant may not deny the title of him who has put him in possession,) "the supposed generality of the rule has been departed from in many cases," citing *England v. Slade*, (*ubi supra*,) *Doe v. Ramsbottom*, (3 M. & S., 516,) and *Rogers v. Pitcher*, (6 Taunt., 202,) and add: "A variety of cases may be put, in which a tenant would be excused from paying rent to a person not entitled to it."

The discussion thus far had, while it may throw light upon the precise point to be decided, does not fully embrace or determine it.

That eviction of the tenant by a third person under title paramount is a good defense; that such an eviction suspends the rent, is unquestionable, and is not denied in this case.

And that if the tenant be evicted under such a title, of a part of the demised premises, the rent must be apportioned; and that such eviction is a defense, as to a part of such rent, is equally settled. (*Richard Le Taverner's Case*, 1 Dyer, 56; *Lewis v. Payn*, 4 Wend., 423; *Lawrence v.*

Moffat v. Strong.

French, 25 Id., 443; *Peck v. Hiler*, 24 Barb., 182, 186; *Hegeman v. McArthur*, 1 E. D. Smith, 147; *Vermilya v. Austin*, 2 Id., 203; affirmed on appeal, 11 N. Y. R., 216.)

The very proposition that an eviction by a third person, under paramount title, suspends the rent, affirms that, being evicted, the tenant may show that the evictor had title paramount to that of the landlord; nay, that he must show it in order to establish his defense. In the very terms of the rule, then, it is implied that, being evicted, the tenant may deny his landlord's title. And this he may do by showing that his landlord never had title, or that his title has ceased or expired. But it is, nevertheless, the eviction and not the denial of the landlord's title, or proof of its failure, which constitutes the defense. The proof of paramount title is in order that the eviction may be a defense, and because eviction by a stranger to the title is no defense. The result may be thus stated. Eviction under title paramount is a defense. In order to establish it, the tenant must prove title in the evictor. This may be by proving that the title was in such evictor before the lease and ever since, notwithstanding the incidental result that in such proof he shows that even at the time of the demise his landlord had no title. Or it may be by proving that the title has been acquired by the evictor since the lease, and notwithstanding in such proof he shows that, although the landlord had title at the time of the demise, that title has ceased. But, in each case, eviction, or what is in law tantamount thereto, must be proved.

Can that eviction be proved otherwise than by judgment or decree; or, in other words, will anything short of removal from the premises, by or under a judgment or decree, amount to an eviction?

It will be seen by reference to the cases already cited, that where the lands have been sold under foreclosure or on execution, since the making of the demise, and the title of the landlord is thereby divested, (whether the mortgage was given before or after such demise,) the right of the landlord is at an end; and so also that where the title of

Moffat v. Strong.

the landlord was defeasible or terminable by lapse of time, if it was defeated or terminated during the term, the landlord's right to rent also ceased.

But here the eviction sought to be established as a defense, involves the necessity of proving that the landlord had no title when he gave to the defendant his lease. We can find no sufficient reason for saying that if the tenant is put out of possession without a judgment or decree, he may show that the landlord's title had expired, and the title of the disseizor was paramount, and yet that, (although he is put out of possession,) he may not show that his landlord never had the title, and so that the title of the disseizor was paramount.

Be it observed that we are not considering whether a tenant may attorn to a stranger. That question is settled by statute, both in England and this State. The point is not on the validity of an attornment, but is, whether, being put out of possession, the tenant may show that this was done under a title, the validity of which he could not impeach, by virtue of a right which he could not legally deny, and by an authority which he could not legally resist; for all this, the tenant in such case assumes to do, and did assume to do in the case now before the Court.

The definition of the term "eviction," given by Jacobs, it is true, declares it to be "a recovery of land, &c., by form of law." But, conceding that to be the original and technical meaning of the term, it is used, nevertheless, in a modified and more general sense when applied to eviction by the landlord himself, and also to a breach of the covenant for quiet enjoyment, and of the covenant of warranty. (See 1 Saund., 202, 204, note; *Upton v. Greenlees*, 17 Com. Bench R., 51; several of the cases already above cited, Rawle on Covenants, Tit. "Covenant for Quiet Enjoyment," and "Covenant of Warranty and the breach thereof.")

In *Hopcroft v. Keys*, (9 Bing., 613,) where the landlord's title was a defeasible one, the tenant was permitted, in answer to an avowry of taking as a distress for rent,

Moffat v. Strong.

to show that the landlord's title was defeated: that the real owner entered for condition broken, but without process, and turned out all in possession, and afterwards made a new agreement with the tenant, under which he was in possession at the time of the distress. This case tends strongly to show that what is called eviction by title paramount does not mean necessarily and solely eviction by legal process or under a judgment or decree.

In *Upton v. Greenlees*, (17 Com. Bench R., 64,) JERVIS, Ch. J., said: "The term eviction is now properly applied to every class of expulsion or amotion," &c. It is true that there the eviction alleged was by the lessor himself, but no good reason is apparent for withholding its application from a forcible expulsion or amotion by the true owner which the tenant cannot successfully resist or prevent.

And in *Mayor of Poole v. Whitt*, (15 Mees. & Wels., 571; 16 Law J., 229,) where eviction under paramount title was pleaded as a defense to an action for rent, although the defendant failed on the ground that the title proved was not paramount, but a title to the reversion only, yet Ch. Baron POLLOCK, says: "If a party having a good right to eject the occupier of demised premises, goes there and demands to exercise that right, and the tenant says, 'I will change the title under which I now hold and will consent to hold under you,' that, according to good sense, is capable of being pleaded as an expulsion."

And in *Evertson v. Sawyer*, (2 Wend., 507,) Ch. J. SAVAGE, asserting the rule that in an action for use and occupation the tenant cannot deny the title unless he first divests himself of possession, held, following the opinion of Lord CAMPBELL, in *Balls v. Westwood*, (2 Camp. 11,) that the tenant might disclaim the title under which he entered, and take a new lease from the purchaser at Sheriff's sale; and although this would be an attornment void under our statute, yet it would operate as a defense to the claim for rent.

And in *Greeno v. Munson*, (9 Verm., 37,) *North v. Barnum*, Bosw.—VOL. IX. 10

Moffat v. Strong.

(10 Id., 220,) it was held that, the tenant acknowledging the title of another in repudiation of his landlord's title, his possession becomes adverse and the statute of limitations begins to run in his favor.

The precise point now before us, that is to say, whether the tenant could allege and prove dispossession (without a judgment or decree) by a third person, under title paramount, was considered and decided by the Supreme Court of Massachusetts, in *Morse v. Goddard*, (13 Metc., 177.) It was there held that it is not enough for the tenant to prove an outstanding title to avoid the payment of rent, but he must show an ouster or eviction under that title; but an eviction under a judgment is not necessary. An actual entry by one having a paramount title and present right of entry is an ouster of the tenant, and the latter is not bound to hold unlawfully and subject himself to an action, and is not, therefore, bound to resist such an entry. In that case, the Court went much further than this, and further than necessary to the point now under consideration, viz., that a judgment or decree is not essential to such an ouster as will excuse the payment of rent.

The tenant there had voluntarily yielded to the claim of the true owner on being threatened with an ejectment, and after notice to his landlord of the claim, had consented to pay rent to the claimant. The charge to the Jury was, "if the defendant, *bona fide*, yielded possession of the premises to the real owners, to prevent being expelled, and the plaintiff (the landlord) had notice of this, and if the defendant had satisfactorily proved that the claimant owned the estate by a good title, and had a right to take immediate possession at the time, * * * such yielding of possession was equivalent to an actual ouster, and was competent evidence in defense to the plaintiff's claim for rent accruing after such yielding of possession." And this charge was fully sustained.

The defendant in such case has the burthen of proving, not only that the claimant's title is paramount to that of the landlord, but that he acted in good good faith.

If the absence of any statute in Massachusetts, forbidding an attornment to a stranger, gave the decision a larger scope than would be proper here, the case, nevertheless, is a direct authority that the tenant is not bound to wait for a judgment or decree, nor resist by force a claimant having the actual title and a present right of entry. And the decisions in *Fitchburg Co. v. Melven*, (15 Mass. R., 268;) and *Smith v. Shepard*, (15 Pick., 147,) justify a tenant in yielding to the entry of a mortgagee, under a mortgage given before the demise, and hold the entry of such mortgagee an eviction, and, as such, a defense to an action of covenant for the rent. And so also in *George v. Putney*, (4 Cush., 355,) the doctrine was asserted that a lessee under a defective title may yield the possession without awaiting a judgment or decree.

In the American notes to *Moss v. Gallimore*, (1 Smith's Lead. Ca., 595, [310],) it is said, "no estoppel or form of action can deprive the tenant of his right to show an eviction by title paramount, and such eviction must always suspend subsequently accruing rent. Now, it is perfectly well established, that to obtain the legal right given by an eviction, it is never necessary to wait for an ejection by form of law."

In *Blair v. Claxton*, (18 N. Y. R., 529,) a partial eviction was held not only to entitle the tenant to an abatement of the rent, but that it might be shown as a counterclaim by way of recoupment, as an equitable defense, and would entitle the defendant to damages for a breach of the covenant for quiet enjoyment. In that case the claimant of the elder title had, it is true, established such title as against the landlord, by a decree; but the tenant was not evicted by the decree. He was evicted or ousted by act of the party having paramount title; the existence of the decree, (conclusive as against the landlord,) only furnished the tenant with the ready means of proving that such title was in fact paramount, and so this case in effect affirms the views above expressed.

These considerations and a review of the cases above

Moffat v. Strong.

referred to, seem to us to show, that the tenant, being put out of possession, may defend an action for the rent by proof that he was ousted by one having a title paramount to that of the landlord, although the ouster was not by virtue of a judgment, decree or any legal process;—such tenant taking the burthen of proving that he acted in good faith, and that such title was in fact paramount;—and that the proof offered in this case would have established such an ouster, and should have been received.

2. If this case be considered, secondly, upon the question whether the facts alleged do not constitute a breach of an implied covenant for the quiet enjoyment of the premises, then there are other cases, as well in this State as in other of the United States and in England, bearing upon this subject. The lease here was for three years only, and was under seal. If it was doubtful whether leases for years were embraced in our statute, which declares that “no covenant shall be implied in any conveyance of real estate;” (1 R. S., 738, § 140;) and the case of *The Mayor, &c., v. Mabie*, (13 N. Y. R., 151,) contains the opinion that such leases are not so included; it must be taken, as settled by that case, that leases for a term not exceeding three years are not. (*Edgerton v. Page*, 20 N. Y. R., 286.) If not, there was an implied covenant by the plaintiff for the quiet enjoyment of the demised premises, and the question arises what constitutes an eviction amounting to a breach of that covenant. And on this question the modern doctrine is that such a covenant is broken, and the breach may be proved by the covenantee, by an expulsion by one having paramount title without any judgment or decree. Such is the doctrine clearly derivable from what is said on this topic in Rawle on Covenants, and the numerous cases cited there; and, so far as we can discover, the cases which hold the covenant of warranty broken by such an expulsion are equally in point. (See also *Blydenburg v. Cotheal*, 1 Duer, 196, and cases cited.)

Platt on Covenants, in treating of the action on the covenant for quiet enjoyment, states (p. 328) where an

Moffat v. Strong.

ejection has actually taken place, in assigning a breach, it is sufficient to allege that, at the time of the demise to the plaintiff, A. B. had lawful right and title to the premises, and having such lawful right and title entered and evicted the plaintiff, without showing that he evicted him by legal process, citing *Foster v. Pierson*, (4 T. R., 617,) *Hodgson v. East India Co.*, (8 Id., 278.) The question discussed in these cases was one of pleading, but, in the first, BULLER says it is the same as saying "he entered by lawful right and title," and at the trial the plaintiff would have failed in proving this allegation unless he had shown a right of entry in A. B.

And in 2 Stephens' Nisi Prius, 1084, it is said this covenant will not extend to a tortious eviction or ejectionment by a stranger, "but if the stranger claim by older title than the lessor's, the lessee may have covenant against the lessor, for he then can have no redress against the stranger, whose title is good in law."

And in *Hamilton v. Cutts*, (4 Mass. R., 349,) which was an action for breach of warranty, it was held that the tenant may yield to a dispossession without losing his remedy on the covenant. But he consents at his peril. If the title to which he has yielded be not good, he must abide the loss; and in a suit against his warrantor the burthen of proof will be upon the plaintiff. So in *Drew v. Towle*, (10 Foster, 537,) the Court held that the covenantee had an undoubted right, upon being satisfied of the invalidity of his title, to abandon the possession of the premises, and thereby avoid the necessity of litigation and its attendant perplexities and expenses. He owed the covenantor no duty to remain in possession and sustain the burthen of defense when the title was invalid; * * the right of the covenantee was, at any period, to give up the possession to the rightful owner, upon claim made; he was not bound to seek redress through a litigation which might be fruitless with the party having the title. (*George v. Putney*, 4 Oush., Miss. R., 354.)

In *Parker v. Dunn*, (2 Jones, N. C. R., 203,) it is held that a covenant for quiet enjoyment is broken, when the

Moffat v. Strong.

covenantee is entered upon and dispossessed by one having superior title, though the entry is not made under process. (And see *Coble v. Wellborn*, 2 Dev., 388; 2 Hilliard on Real Prop., 382.)

In *Stone v. Hooker*, (9 Cow., 157,) the above case of *Hamilton v. Cutts* is cited by Mr. Justice COWEN and approved as "sound."

In *Lansing v. Van Alstyne*, (2 Wend., 563, 565,) Ch. J. SAVAGE concluded that the eviction which would alone avail as a defense to the claim for rent, or as a breach of the covenant for quiet enjoyment, must be by due process of law, and yet the cases cited, and the inference therefrom, appear to lead to the opposite conclusion; and, subsequently, in *Greenvauld v. Davis*, (4 Hill, 645,) BRONSON, Justice, declares that he has met with no case where the point was so adjudged; and he adds that the remark of Ch. J. SAVAGE, in the case mentioned, was not necessary to the decision of the case, nor the point decided; and thereupon it was held that to maintain an action on the covenant of warranty or for quiet enjoyment, that the eviction must be lawful, yet it need not be by process of law. (See the cases there cited, and the observations on *Hunt v. Amidon*, Id., 348.)

Again, in *St. John v. Palmer*, (5 Hill, 599, 602,) the same rule is asserted, viz.: "It is not necessary that he" (the covenantee) "should be evicted by legal process; it is enough that he has yielded the possession to the rightful owner." And in *Fowler v. Poling*, (6 Barb. S. C. R., 165,) the subject is discussed at length by EDMONDS, J., and the rule re-affirmed. (*White v. Whitney*, 3 Metc., 81; *Sterling v. Peet*, 14 Conn. R., 244; *Averill v. Wilson*, 4 Barb. S. C. R., 180; *Mitchell v. Warner*, 5 Conn. R., 521, 522; *Blydenburg v. Cotheal*, 1 Duer, 196.)

In this view, also, the evidence offered by the defendant was admissible, and should have been received.

The judgment should be reversed and a new trial ordered, the costs of the former trial and of this appeal to be costs in the cause, and abide the event.

**JOHN B. DINGELDEIN, Plaintiff and Respondent, v. THE
THIRD AVENUE RAILROAD COMPANY, Defendants and
Appellants.** •

1. Where an unincorporated railroad company, desiring to control the construction of a public sewer under their track, procured the contract with the city for its construction, in the name of the plaintiff, one of their members, which required him to do it within a fixed time, and to remove obstructions from, and facilitate the preservation of, the track; and then employed him to do the work, agreeing to pay him his expenses over the contract price, and an allowance for his services, and, it being understood that the time in which, by his contract, he was bound to complete it, was too short, he agreed with them to do it in the shortest possible time, and also in a manner consistent with their interests, and not to stop the running of the cars.

Held, that this agreement with the Company was not illegal as against public policy.

2. A corporation was subsequently created to operate the railroad, and the Company conveyed their property to the corporation. The grant was, in terms, subject to the payment the Company had agreed to make to the plaintiff, but contained no covenant to pay it; and the plaintiff went on with the work, with the knowledge of the corporation, and without objection on their part, and their Superintendent, with the knowledge of the President, gave directions as to keeping the track clear.

Held, that these facts did not make the corporation liable for the plaintiff's compensation. To charge them, there must be either an entire novation of the contract, to which the plaintiff, the corporation and the unincorporated company should be parties; or a new promise on the part of the corporation should be shown.

3. An assignment under seal, expressed to be subject to the payment of a debt to a third person not a party to the instrument, where the assignee does not promise to pay, and the debt to be paid, is not a lien on the thing assigned, does not entitle such third person to maintain an action therefor against the assignee.

4. *It seems* that illegality in a contract sued on, though shown by the testimony, cannot avail the defendant, unless it is alleged in the pleadings; and that an allegation in the answer that the contract was illegal, coupled with an enumeration in the same paragraph, of specific grounds of illegality, does not entitle the defendant to prove any ground of illegality not so specified.

(Before WOODRUFF, MONCRIEF and ROBERTSON, J. J.)

Heard, October 15, 1861; decided, December 28th, 1861.

Dingeldein v. Third Avenue Railroad Company.

THIS was an appeal by defendants from a judgment in favor of the plaintiff, entered upon the report of Charles P. Kirkland, Esq., Referee, to whom the cause was referred for trial.

The plaintiff sought to recover, in this action, the excess of his expenditure in building a public sewer in the Third Avenue, one of the public streets of the City of New York, beyond the sum received by him therefor, from the corporation of that city.

The following are substantially the facts set out in the complaint: Prior to October, 1853, a private association in the City of New York, of the same name as the defendants, and of which the plaintiff was a member, owned a railway laid down in the Third Avenue. Such association appointed a committee, of whom the plaintiff was one, to prevent obstructions on the road. The officers of the city corporation awarded to a Mr. Benjamin, who was one of such association, in June, 1853, a contract for building a public sewer under such railway, and the association passed a resolution "to have such sewers constructed on the most favorable terms to themselves, and "to pay any deficiency in the cost of such work, above "what the corporation might agree to pay." Benjamin failed to give the necessary security, and the plaintiff, by the authority of the rest of the associates, made a contract with such corporation to construct the sewer, and such associates agreed with him, to reimburse him his actual expense of so constructing it, with a reasonable sum for his services, less the amount to be received from the city corporation, and "*he agreed not to obstruct the running of "their cars during the work.*" The plaintiff commenced the construction of such sewer in July, 1853. The defendants were incorporated in October following. On the day of their incorporation the members of such association, and other persons interested in such railroad, as parties thereto of the first part, and the defendants, by their corporate name as parties thereto of the second part, executed an instrument under seal, by which agreement the parties

thereto of the first part sold to the parties thereto of the second part, for upwards of a million of dollars, a grant from the City of New York to certain of such associates, made in January previous, and the railway constructed by virtue of such grant, with the appurtenances, except certain real and personal estate, subject to the terms and stipulations of such grant, which the parties thereto of the second part covenanted to perform, and subject also to the payment of all the money which such association had resolved to pay on account of the beforementioned sewer, and also to other burdens; as to all of which there was no covenant to pay. The plaintiff completed the sewer in August, 1854. During its progress, and before it was completed, the defendants requested him to remove earth thrown upon the railway during its construction, and promised to pay him all sums expended by him in building such sewer and keeping the track clear, with a reasonable sum for his services, less the amount paid by the city corporation. The complaint, after alleging these matters, then set forth the amount of the plaintiff's expenditures in building such sewer, alleged what was a reasonable sum for his services, admitted the receipt from the city corporation of a certain sum, and demanded judgment for the residue.

The answer of the defendants controverted the amount alleged in the complaint to have been expended in constructing the sewer mentioned therein; it denied the making of any such agreement with the plaintiff, by the partnership as is therein alleged, and alleged that he agreed to waive all claim against it, and to receive the contract price as full compensation; it denied that the defendants required the plaintiff to remove the earth from such sewer, as stated in the complaint, and that they agreed to make up to him the deficiency in the contract price. It alleged that the plaintiff did not complete such sewer until November, 1854, and did not perform his contract according to its terms, and did unnecessarily obstruct the cars in passing on such road. It also set up, by way of counter-

Dingeldein v. Third Avenue Railroad Company.

claim, damages from the non-completion of such work in ninety days. It also claimed that seven hundred and fifty dollars of the amount expended by the plaintiff was paid to the City Inspector for the time of constructing the sewer, which was unnecessarily long; and alleged other damages and expenses to the defendants, by reason of such unnecessary delay, which it claimed to set off. It also interposed a set-off for goods sold and delivered by the defendants to the plaintiff, and also an indebtedness from the partnership mentioned in the complaint to the defendants for money lent, and that the payment of such indebtedness was, by agreement, a condition precedent to the performance of the agreement under seal, set out in the complaint, of both which facts it averred the plaintiff had knowledge.

The answer set up a separate and further defense in its seventh paragraph; in which the defendants alleged "that the partnership (before spoken of) were never legally bound to pay the plaintiff any money for the construction of such sewer;" that the contract with him, or any note thereof in writing, was not signed by the association; that there was no consideration for it; that the sewer was constructed for the corporation of the City of New York, and the payment for it was solely their debt.

A reply was put in by the plaintiff to the defendants' answer, which denied unreasonable delay by him in performing the contract, and any damage thereby to them, and any indebtedness by the plaintiff to them, as alleged in such answer, and alleged that any delay by the plaintiff was permitted by the original partnership, and was for their benefit.

No issue was formed on the matters contained in the seventh paragraph of the answer, by any subsequent pleading.

The issues in the action were ordered to be tried by a Referee; and on the trial, the contract between the plaintiff, the corporation of the City of New York and its Croton Aqueduct Department, made in June, 1853, for the build-

Dirigeldin v. Third Avenue Railroad Company.

ing of a sewer from 49th to 53d street, in such part of the Third Avenue as that Department should direct, was put in evidence.

By the contract the work was to be begun in July following, and completed in a hundred days, exclusive of holidays, and any other time during which its prosecution was suspended, according to such agreement. It contained, also, a provision that in case of the failure of the work to advance according to the agreement, so as, in the opinion of the Aqueduct Department, to be unnecessarily delayed, that Department was to have the right to carry on the work, deducting the expense from any money due to the plaintiff. The only part of the work, for the suspension of which, provision was made therein, was the masonry, which was to last from the 1st of December as long as the Aqueduct Department should think proper.

The shape, size, materials, workmanship, direction and finish of the main work, with its appurtenances, were fully detailed in the contract. It provided, also, for the support of gas and water pipes, and the deposit of them and gutters, also of stones, rock, sand and earth, during the work, and removing the latter when the work was completed; also for the size of the trenches, and the length of their sections in advance of building the sewer; the street-piling and refilling, and the subsequent repairing and regrading the surface of each section as completed, and immediate removal of the earth, sand and rubbish therefrom.

The plaintiff, in and by the contract, agreed "*to preserve from obstruction all rail tracks which might be affected by the prosecution of*" such "work, and also to *afford the necessary facilities* to the companies owning them, or to their agents, *in their preservation of the same from injury, without extra charge therefor.*"

On the trial a witness, examined on behalf of the plaintiff, testified "that it was part of the understanding and "agreement" of the association with the plaintiff, made simultaneously with their promise to reimburse his expen-

Dingeldein v. Third Avenue Railroad Company.

ditures on the sewer in question, "that more time would "be required to construct it than was given him in the "corporation contract, BUT *he was to do it in the shortest "possible time, AND in such a way as not to interfere with "or interrupt the running of the railroad cars."* On a motion to dismiss the complaint, made afterwards, one ground urged was that such a contract violated public policy.

On the trial it was admitted that subsequently to the date of the transfer of the railway and its appurtenances to the defendants, their superintendent gave the plaintiff, while carrying on the construction of the sewer, directions about carting away dirt and keeping the track clear, and their president told the plaintiff "it would make no difference to him as the defendants *would have to pay him "for building the sewer," &c.*

Several witnesses examined on the trial differed as to the time necessary for the building of such sewer; it actually took over a year for its completion. Some evidence was also given as to the increase of the labor of the plaintiff in consequence of his efforts not to interrupt the running of the cars. A question, to an expert, as to "whether the "laying of the tracks and operating on the road in this "case were necessarily obstructions to the building of the "sewer," was excluded. The plaintiff, however, testified that the increased expense to him was caused by his being obliged to cart away dirt and bring it back, to prevent its interrupting the cars.

The Referee, in his report, did not pass upon the existence of any promise of the defendants to pay the plaintiff, other than that supposed to be made by the instrument of October, 1853. His report was also silent as to there being any difference of time in building the sewer, by reason of the means used to prevent any obstruction of the running of the railway cars of the defendants, or in the disturbance of the highway thereby, for a longer time than that fixed in the corporation contract, or there being

a disturbance of the highway as long as the sewer was in the course of construction.

Among the facts, however, found by the Referee's report were the following :

First. An understanding between the plaintiff and the association, contemporaneous with their contract, "That *more time* would be required for building the sewer in a *manner consistent with the interests of such association, in using such road*, than was fixed by the city contract."

Second. An agreement between the same parties, that the plaintiff should finish the work "*in as short a time as possible, BUT so as not to interrupt the running of the cars.*"

Third. Knowledge of the work, during its progress, by the agents and officers of the defendants.

Fourth. A direction to the plaintiff by the superintendent of the defendants, during the progress of the work, to cart away dirt, and a knowledge by the President of the defendants of such direction.

Fifth. The absence of any complaint by the association or the defendants, of the work, or any delay in completing it.

The Referee applied to such facts, among others, the following principles or conclusions of law :

I. The agreement between the plaintiff and the association, mentioned in the complaint, did not violate any principle of public policy.

II. The defendants became bound to perform such agreement by the instrument of October, 1853.

III. The defendants were also so bound by perceiving, without dissent, the action of the plaintiff, in constructing the sewer in question.

The defendants filed exceptions to such report, both for its finding certain facts, and its omission to find others, as well as the principles of law applied to such facts in the report.

Judgment was entered in favor of the plaintiff for the amount found due by the Referee, being for the excess of

Dingeldein v. Third Avenue Railroad Company.

his expenditures beyond the contract price, from which judgment the defendants appealed to the General Term.

Charles O'Connor, for the defendants, (appellants.)

I. There was no privity of contract between the corporation and the plaintiff. His claim, if any, is against the partnership.

II. The alleged agreement between Dingeldein and the partnership was a conspiracy to violate the law. 1. One feature of it was that, by deceit of the public authorities, the job should be awarded to the plaintiff, at a compensation higher than that specified in the lowest bid. 2. The alleged agreement contemplated the disturbance of the Third Avenue, for a long period, merely to subserve the private interest of the Railroad Company. a. Public highways are merely for passing and repassing. Any other use, without express license from competent authority, is a public wrong. (*Davis v. The Mayor, &c.*, 4 Kern., 524; *Dovaston v. Payne*, 2 H. Black., 527; *S. C.*, 2 Smith's Leading Cases, 90, 28 L. Lib., N. S.; *Rex v. Cross*, 3 Camp., 226; *Rex v. Jones*, 3 Camp., 230; 2 Rolles Abr., 137, Nuisance B.; 3 Bac. Abr., 497, Highways E.; *Commonwealth v. Passmore*, 1 Serg. & R., 219; *King v. Russell*, 6 East, 427; *Rex v. Carlile*, 6 Car. & Payne, 636; *People v. Cunningham*, 1 Denio, 524; 14 Conn., 317; 6 Barn. & Cress., 566; 1 Dall., 150; *Fowler v. Sanders*, Oro. Jac., 446; 3 Com. Dig., 27, Chimin A, 3.) b. A contrivance by private individuals to prolong, for their private advantage, the time of the disturbance caused by the public work, was a trespass on public right, and a violation of public policy.

III. All agreements to violate law, or to contravene the legitimate policy of the government, are vicious, and no right can accrue from them. (*Bell v. Leggett*, 3 Seld., 176; *Spinks v. Davis*, 32 Mississippi R., 152; Broom's Maxims, 349, 50th Law Lib., 222; *Merryweather v. Nizan*, 2 Smith's Leading Cases, 297, and note; 2 Kent's Com., side paging 466, 467, and notes; American Jurist, (Boston,) vol. 22, pp.

Dingeldien v. Third Avenue Railroad Company.

266, 270; *Bartle v. Coleman*, 4 Peters, 183; 3 T. R. 552; *Satterlee v. Jones*, 3 Duer, 116, 117; *Wall v. Charlick*, N. Y. Leg. Obs., vol. 8, p. 230; *Cunningham v. Cunningham*, 18 B. Monroe, 19; *Sumner v. Brady*, 1 H. Bl., 655; *Hatch v. Mann*, 15 Wend., 45; *Gray v. Hook*, 4 Comst., 454; *Davison v. Seymour*, 1 Bosw., 92; *Eddy v. Capron*, 4 Rh. Isl., 394; *Ingram v. Ingram*, 4 Jones N. O. Law, 188; *Greene v. Godfrey*, 44 Maine, 25; *Bellows v. Russell*, 20 New Hampshire, 427.)

IV. The alleged agreement was manifestly illegal, and therefore the judgment should be reversed.

John W. Edmonds, for the plaintiff, (respondent.)

I. The liability of the defendants depends on the following considerations: 1. Their contract of 8th Oct., 1853, to pay all the money which the partnership were, by a resolution, bound to pay; 2. The resolution of the partnership of 21 June, 1853, that any deficiency in the cost, over and above what the corporation pay, shall be paid by them; 3. The evidence that the bid of plaintiff was for the partnership; 4. The bids themselves; 5. The surrender of Benjamin's bid, and the falling back on plaintiff's, which was for the partnership; 6. The agreement of the partnership to make plaintiff whole; 7. The agreement of the defendants, after the transfer to them, to make him whole; 8. The recognition by the defendants while the work was going on; 9. The acquiescence of the defendants in such liability, and their giving directions as to the work, in reference to their convenience, and not plaintiff's, and to the increase of cost to plaintiff.

II. Under such circumstances, the plaintiff could recover even though there had been no privity of contract between him and the defendants, or any consideration passing from the plaintiff to the defendants. (2 Pars. on Cont., 303, and notes *i. m.*; *Ib.*, 308; notes *v.* and *w.*; *Barker v. Bucklin*, 2 Denio, 45; *Cumberland v. Codrington*, 3 Johns. Ch. R., 254; *Farley v. Cleveland*, 4 Cow., 439; *S. C.*, in error, 9 Id., 639; *Schernerhorn v. Vanderheyden*, 1

Dingeldein v. Third Avenue Railroad Company.

Johns. R., 139; *Del. & Hud. Canal Co. v. Westchester Bank*, 4 Denio, 97; *Lawrence v. Fox*, 20 N. Y. R., 268; 1 Story on Cont., § 451; *Hall v. Boardman*, 27 Barb., 82; *Bohanan v. Pope*, 42 Maine R., 93; *Taplin v. Packard*, 8 Barb., 220; *Phillips v. Berger*, 8 Barb., 527; *Forman v. Stebbins*, 4 Hill, 181.)

III. But, in this case, there was privity of contract between these parties, and a consideration moving from plaintiff and defendant. The work was, by defendants' order, done so as to be more expensive to plaintiff, and beneficial to defendants. (1 Story on Cont., § 450; *Wilson v. Coupland*, 5 B. & Ald., 228; *Tipper v. Bicknell*, 3 Bing. N. C., 710; *Webb v. Rhodes*, 3 Id., 734.)

IV. Under the Code, the action can be brought by the plaintiff as the real party in interest. (Code, § 111; *Grinnell v. Schmidt*, 2 Sandf. S. C. R., 705; *Savage v. Bevier*, 12 How. Pr., 166.)

BY THE COURT — ROBERTSON, J. Although what the plaintiff, by the terms of his agreement with the association mentioned in the complaint, agreed with them to do, was to furnish certain materials and do certain work, that work was not of a kind they could have given him authority to do, nor was it peculiarly for their benefit, nor did the structure thereby produced become their property, or pass into their possession; the association did not even agree to pay him either a fixed price or the reasonable worth of the work and materials. His entering into a separate contract to do such work for those who could authorize him to do it, and whose property the sewer became when finished, although at the request of the association, could only raise an implied obligation to indemnify him; and, as an express agreement was made to do so, as well as a previous request to him to do it, it placed him precisely in the position of a mere agent, deriving no personal benefit from the agreement, except the stipulated compensation for his services in superintending the work. That position excluded the application of any rules of law which might create a liability out of mere work and labor, undertaken at the

request of one person, which benefited another, and was directed and accepted by the latter, and also took the case out of the statute of frauds.

It is claimed, however, on the part of the defendants, that such agreement was illegal, because it was accompanied by a condition that the plaintiff, in doing the required work, was not to interfere with the running of the cars on the railway, and also an understanding or expectation that more time than was allowed by the corporation contract would be required to complete such work "*in a manner consistent with the interests of the association in using such road,*" and this too, notwithstanding such securing the use of the road, was not established to have necessarily prolonged any disturbance of the highway, and although there was no evidence to show that consulting the interests of such association prolonged the time necessary for doing the work.

Such a condition, if illegal, undoubtedly would infect the contract by rendering the consideration for the defendants' promise a contract which violated public policy; and nothing could save the undertaking to indemnify the plaintiff, but an abandonment of the illegal contract, and the formation of a new one, excluding the illegal promise which formed the consideration. The first question, therefore, is, whether such promise was illegal; it was if it amounted to an agreement to obstruct the highway, either without authority, for an illegal purpose, or for a longer period than was necessary. (*Dygert v. Schenck*, 23 Wend., 446; *The People v. Cunningham*, 1 Den., 524; *Same v. Lambier*, 5 Den., 9, and cases cited by counsel for defendants; *Renwick v. Morris*, 3 Hill, 621; *S. C.*, 7 Hill, 575.) The times and places of constructing sewers, vaults and drains, are entirely under the control of the corporation of the City of New York, (*Wilson v. Mayor of New York*, 1 Den., 595,) and no one can lawfully interfere with the public streets, for such purposes, except by their authority. In addition to this objection of illegality, it is claimed there is another which vitiates the contract in question, because

Dingeldein v. Third Avenue Railroad Company.

the plaintiff not only agreed, in order to benefit such association, to disturb the highway longer than was allowed by the corporation contract, but also to violate the terms of that very agreement as such. I apprehend that the part of the latter, which consists of the plaintiff's undertaking, is a mere private contract, the violation of which subjects him to damages therefor, either generally or according to the terms of such agreement, and that it is no more sacred than any other contract for work and labor between private individuals; it may, therefore, be laid aside in considering the validity of the agreement in question.

If, however, this be an agreement to disturb the public highway longer than was lawfully authorized, so as to promote the interests of the association at the expense of the public, it is invalid. (*Merryweather v. Nizan*, 2 Smith's Lead. Cases, 297, and note; *Gray v. Hook*, 4 Comst., 454; *Bell v. Leggett*, 3 Seld., 176; *Davison v. Seymour*, 1 Bosw., 92.) Objections are, however, raised to the application of this principle, arising as well from a defect of evidence, as from its insufficiency to sustain the form of the Referee's finding; and arising even from the pleadings.

The defendants have only alleged in their answer generally that the original agreement was illegal, and in the same paragraph proceed to enumerate certain legal reasons why it was void, such as being a collateral undertaking and not in writing, and as being without any consideration by reason of the contract with the corporation; the whole, apparently, stated as one defense. I do not understand that a general allegation that a contract was illegal would enable a party to prove every fact that might make it so; it is rather the averment of a legal result than a fact, and the enumeration of legal objections in the same paragraph would seem to be an explanation of what was meant by such illegality. The Code requires defenses to be separately stated, (§ 150.) When so stated they are to be treated as separate pleas would under the old system. (*Cobb v. Frasco*, 4 How. Pr., 413; 3 Code R., 43.) The

paragraph in question could clearly, under that system, only amount to a plea of the special matters set up in it.

But it was contended that if the contract could not be proved, without proving the whole of it, including the illegal part, such illegality could be taken advantage of, without pleading it; but I am unable to understand why. The defendant could not truly deny the making of the contract set out in the complaint, if made, and he must either set up the illegality or allow a default. If he untruly denied the making of the contract as set out, that should not enable him to avail himself of the accidental fact of the illegality appearing in the testimony. If the plaintiff could not set out the contract, without showing its illegality, advantage might be taken of it on demurrer, and pleading other matters would possibly not deprive the defendants of the right of moving to dismiss the complaint on that ground; but it would certainly be a novelty to allow, in an action on a promissory note, under an answer denying its making, proof of usury, or that it was given for money lost at play, or any other illegal consideration, without any allegation to that effect in the pleadings.

But even if such illegality were set up in the answer, or the parties had tacitly agreed, by admitting testimony, to try the question, the Referee's statement of the understanding, on which the defendants rely as making the contract in question illegal, is not borne out by the testimony. That proves that the parties thereto understood, which amounts to no more than that they expected, that it would take longer to build the sewer than was allowed by the corporation contract, which might very well be, without affecting the agreement with the plaintiff; and they only added that the plaintiff was to do it in the shortest possible time, and in such a way as not to embarrass the use of the road; both perfectly legitimate agreements, and the last substantially contained in the corporation contract. As it turned out, it did take longer than the contract time, and such deviation was ratified by the city authorities, who paid the plaintiff for his work. The Referee, however,

Dingeldein v. Third Avenue Railroad Company.

in his finding annexes to the expectation of the parties, that the time in the corporation contract would not be sufficient, a qualification which does not appear at all in the testimony, viz., its being done in a manner consistent with the interests of the association in using the road, and he also, by using the exceptive particle "*but*," clogs the undertaking of the plaintiff to do the work as soon as possible, with the condition that he was to so do it as not to interrupt the use of the railway; while, according to the testimony, that was only an additional stipulation, producing a manifest distinction, so far as the question of illegality is concerned.

There may be a wide difference between the time to be occupied in completing a given work, when it is conducted so as not to prejudice other interests, and when it is conducted without regard to them; and this is equivalent to a certainty, in its effect on a contract, when it is assumed by contracting parties to exist. But even the understanding, as stated by the Referee, might not make the contract illegal, for the plaintiff's corporation contract requires him to preserve all rail tracks from obstruction, and gratuitously afford facilities for their preservation; this was as incumbent on him as to build the sewer at all; and he had no right to neglect such obligation, merely in order to finish it by the appointed time; if, by observing it, he exceeded that time, it was a matter of which the city authorities were to avail themselves, and exact the penalties provided for in the contract; or they might, as they actually did, extend the time; so that even if the understanding were as stated by the Referee, it would not avoid the original agreement.

The testimony, however, narrows this point still farther; it simply establishes an understanding that the sewer would require a longer time for building than was specified in the plaintiff's contract; but that he should build it as soon as possible, and so as not to stop the running of the cars, a perfectly innocent undertaking, and not tainting any agreement with illegality. A knowledge by both

Dingeldein v. Third Avenue Railroad Company.

parties that the plaintiff had undertaken an impossibility, and an agreement that he should carry out his obligations as nearly as he could, and without injury to the association, could hardly be perverted into anything unlawful. The result shows that these expectations were not unfounded, and there is no evidence that any one was prejudiced by the parties' agreement.

So far as regards the question of illegality, the Referee was therefore correct in his conclusion, for the reasons already stated ; but a more serious question arises, which was presented, but not fully argued, by the counsel for the defendants, as to their liability in any way for the contract of the association. The Referee places such liability, first, upon the written instrument of assignment of October, 1853, and their omission to dissent, while they were continually acquainted with the plaintiff's work on the sewer and the neighboring street. The facts he relies on to sustain such conclusions are, the knowledge by the defendants of the plaintiff's work as it progressed ; the presence of their officers on the road during that time ; the direction by their Superintendent to keep the track clear ; the knowledge by the President of such direction, and the failure either by the partnership or the defendants to complain of such work or any delay on it.

The plaintiff's construction of the sewer was under a contract with the city corporation, by their authority, and to be paid for by them, and the sewer became their property when completed ; the defendants could not have legally interfered with such construction ; the plaintiff was not their agent, had made no contract with them, and any objection on their part would have been perfectly idle ; if they had made it, and the plaintiff had stopped work in consequence, he would have been liable for all the penalties of his contract with the corporation officers, without any right of indemnity from any one. Their silence, therefore, is not such an acquiescence as to create a liability on their part to indemnify the plaintiff, any more than the silence of any person owning property in the neighbor-

Dingeldein v. Third Avenue Railroad Company.

hood. The misapprehension of law involved in the report arises from confounding the relations of the parties with those which might arise from the performance of work for the partnership, accepted by the defendants and beneficial to them; whereas the work was performed by an agent of the partnership for a third person, under a promise by the firm to indemnify him for loss, and the defendants had no right to interfere either to accept or reject it, and the benefits were no greater to them than to a thousand others. Under such circumstances nothing but an entire novation of the contract to which the plaintiff, defendants and partnership should be parties, or a new promise by the defendants, for a new consideration, would make them liable.

I apprehend the assignment by the partnership to the defendants of property in October, 1853, could not operate as such a novation, because the plaintiff was not a party to it, and did not assent to any substitution of the defendant, as his debtors, in place of the partnership. So far as it contains any stipulations by the defendants, it is under seal, and any action could only be on such stipulations as covenants in their name, as they are the parties interested. It is true that if such instrument contained words implying an undertaking by the defendants to pay the money due the plaintiff, the case would come within the language adopted by Judge COMSTOCK, in the case of *Belmont v. Coman*, (22 N. Y. R., 438,) and the acceptance of the transfer with such words would raise a promise; but it does not, and only has the same expression as that contained in the conveyance discussed in that case, which was held not to impose a liability on the grantor; the property is conveyed subject to the payment of certain sums, and the covenants in the grant or lease assigned by the instrument in question are expressly thereby assumed; while this payment, and all others mentioned therein, are not. What redress the partnership might be entitled to under such instrument, for the failure of the defendants to pay the plaintiff his claim, is immaterial; it is sufficient

that it does not profess to give the plaintiff any rights, and that he cannot sue upon such instrument. The money due the plaintiff was not a lien upon any of the property transferred, but was entirely collateral; a transfer so made subject to such a payment, may thereby become conditional, or the sum may be part of the purchase-money, which the vendors may have a right to recover in case they have paid it, but it cannot create a contract directly between the vendees and the plaintiff, who was a stranger to the assignment.

The complaint, it is true, alleges that by such assignment the defendants became possessed of the property mentioned therein, and agreed to pay to the plaintiff the amount agreed to be paid him by such partnership. That allegation, if not controverted in fact by the first paragraph of the answer, is a mere averment of the legal consequences of the agreement, and not of a separate and independent promise; it does not even contain any statement of any consideration for such separate promise.

There is, however, a statement in the complaint of a requisition by the defendants of the plaintiff to remove earth taken from the sewer to a great distance, and a promise thereupon by the former to pay the latter all sums expended by him in building such sewer, and keeping the track clear, as well as for his services above the amount paid by the city, both of which facts are denied in the answer. The Referee has not passed upon the issue so made, except as to request to cart away dirt, which he has found as a fact. The plaintiff testified that he was put to extra expense in carrying away such dirt, and it was admitted that this was done by direction of the defendants' Superintendent, and that their President "then 'said to the plaintiff, it would make no difference to him 'as the defendants would have to pay for building the 'sewer.'" The Referee does not find, from that evidence, any promise, and puts the liability of the defendants on a different ground, to wit, the assumption by the instrument of October, 1853; nor does he find whether the work so

Dingeldein v. Third Avenue Railroad Company.

done by the plaintiff came within the terms of the agreement by him with the city officers; particularly the clause "*requiring him to preserve from obstruction the rail tracks, affected by the prosecution of the work therein described.*" If it did it would not form the foundation of a new promise, as the corporation and the partnership would be already liable for that. It must, therefore, be referred back, to enable the plaintiff, if he can, to prove the extra work and the separate promise, or if not the latter, to recover the value of such extra work.

I have not deemed it necessary to discuss the point of illegality in regard to the offers to the city officers to do the work; the only object of requiring such bids was to protect the city; any agreement, undoubtedly, between competitors, not to bid, or to withdraw their bids, so as to prevent competition, would be subject to the same objection as if it were a public auction. But there is nothing to prevent any separate or joint contractors from making several offers, and withdrawing any they pleased, which is the most contended for here, all the bids being put in by the agents of the partnership at different rates, they retained the most favorable one. But in fact the testimony does not establish any arrangement before putting in the bids, and the lowest one was allowed to expire by not giving security. No facts constituting such illegal arrangement, and no illegal arrangement, was found by the Referee.

But for the reasons before given, the judgment must be reversed and a new trial awarded, with costs to abide the event of the action.

CHARLES PRATT et al., Plaintiffs and Respondents, v. THE UNION MUTUAL INSURANCE COMPANY, Defendants and Appellants.

The defendants, an insurance company, issued to D. & Co., their agents, a marine policy, to cover only property, to be indorsed by D. & Co., losses payable to the parties named in certificates to be granted by D. & Co., and the aggregate amount to be thus insured was limited is \$250,000. Subsequently the defendants, by a certificate, increased the amount which the agents might certify, as insured, by the further sum of \$250,000. At a later date they issued to the agents a second policy, similar to the former.

Held, that a certificate of insurance, issued to the plaintiffs, by the agents, under the second policy, and in terms referring to it, and entered upon it, was not invalidated by the fact that prior insurances, purporting to be made under the first policy and its renewal, exceeded in the aggregate the whole sum which the agents had been authorized by both policies to insure.

(Before WOODRUFF, MONCRIEF and ROBERTSON, J. J.)

Submitted October 17th, 1861; decided December 28th, 1861.

Appeal from a judgment in favor of the plaintiffs, entered upon the decision of Chief Justice BOSWORTH, after a trial before him, without a Jury, in October, 1859.

This action was brought by Charles Pratt and William A. McKenzie, to recover \$18,571, for a loss upon a contract of insurance, alleged to have been made by the defendants, through their agents, J. Day & Co., at Apalachicola, Florida.

The nature of the agents' authority, and the mode of transacting the business, are fully stated in the report of the case of Hartshorne against the same defendants, 5 Bosw. 538.)

Among other facts, the Chief Justice found that the agents, J. Day & Co., shortly after receiving the second policy, (No. 993,) issued a certificate to the plaintiffs, which, by its terms, was stated to be "entered this day on policy No. 993;" that the aggregate amount of risks entered upon Day & Co.'s register of risks, arising upon definite insurances effected prior to the date of the certificate to the plaintiffs, and of risks arising within the description of gen-

Pratt et al. v. The Union Mutual Insurance Company.

eral certificates, which were prior in date to the certificate to the plaintiffs, was \$760,093; one of which prior certificates was issued by Day & Co. to themselves, for over \$49,000. And he held that there was no such oneness in the authority conferred by policy No. 784 on J. Day & Co., and in that conferred on them by policy No. 993, that J. Day & Co. could claim, by virtue of the certificate issued to themselves under policy No. 784, to be insured under policy No. 993 in preference to, or to the exclusion of these plaintiffs, to whom a certificate was issued under policy No. 993 on 31st of December, 1853. So that, even if it must be held that J. Day & Co. could not bind the defendants, so as to make them liable for an aggregate of risks exceeding \$750,000 these plaintiffs were insured, as to the property in question, and were entitled to judgment.

From the judgment entered accordingly, the defendants appealed to the Court at General Term.

William M. Evarts for defendants, (appellants.)

I. By the decision of this Court in Hartshorne's case, holders of general certificates are protected in respect of risks within their description, as from the date of the certificate, and on this principal defendants are entitled to judgment in this case.

II. The whole aggregate of insurance possible, under the authority of the defendants, was \$750,000. Prior to the risks on which plaintiffs' loss accrued, there was an aggregate of insurance of \$760,093. Under the principles, then, established in Hartshorne's case, the aggregate of insurance was exceeded, before the plaintiffs' risks, in question, had their inception.

III. To overcome this result, the Court is required to establish certain additional principles which have received the assent of the learned Judge at Special Term.

1. Certain risks taken and entered under a "general certificate" to J. Day & Co., prior in date to the "general certificate" to the plaintiffs, it is said, should be excluded from the computation.

Pratt et al. v. The Union Mutual Insurance Company.

2. That the plaintiffs are entitled to apply their certificate to the last policy of \$250,000, to the exclusion of all risks arising under certificates of an earlier date than such last policy, as well as of all definite risks arising subsequently to the date of the plaintiffs' certificate.

IV. As to the first claim; the whole ground is, that J. Day & Co., holders of these policies, for the purpose of insuring risks in the cotton trade of Apalachicola, could not insure owners of cotton who made them their consignees. This proposition would not be listened to for a moment, in an action by one of these assured against the Company. If not maintainable in such an action, it is not in this action.

V. As to the second claim; the whole course of the correspondence between the Insurance Company and J. Day & Co., as well as the whole dealing of the latter in their conduct of the business, requires the treatment of policy 993, and the insurance under it, as a continuance or enlargement of the previous faculty of insurance, granted in the original policy 784, and its specific renewal.

Charles O'Connor, for the plaintiffs, (respondents.)

I. A general insurance certificate, issued by the agents of the insurers to themselves, and intended to cover the risks of their consignors and themselves as consignees, cannot stand as a valid insurance having priority to the plaintiffs. An agent cannot make a contract between two principals, he acting for both. (*N. Y. Central Ins. Co. v. Nat. Protection Ins. Co.*, 4 Kern., 85.)

II. Plaintiffs' certificate expressly relates to policy No. 993, and cannot be mixed up with insurances under policy No. 784.

BY THE COURT—MONCRIEF, J. This appeal was submitted without argument. The printed case being delivered to the Court, the counsel for the appellants suggested that it was possible no questions arose in the present action except such as were discussed and passed upon in

Pratt et al. v. The Union Mutual Insurance Company.

the case of *Hartshorne v. The Union Mutual Insurance Company*, (reported in 5 Bosw., 538,) and in that event neither argument or points would be presented, assuming that the present General Term would adopt or not dissent from the views there expressed.

The counsel for the respective parties subsequently (in December, 1861) submitted printed points.

Two policies were issued by the defendants and delivered to their agents, J. Day & Co.; one numbered 784, on or about the day of its date, the 27th October, 1852; the other numbered 993, on or about the day of its date, October 28th, 1853.

J. Day & Co., on the 15th November, 1852, issued to themselves a certificate "to cover all cottons shipped per good steamboats, * * * consigned to them by certain named consignors."

The case of *N. Y. Central Ins. Co. v. National Protection Ins. Co.*, (4 Kern., 85,) is decisive to the point that an agent cannot make a contract between his principal and himself. If the decision in the case be held to wholly invalidate the certificate issued to J. Day & Co. by themselves, so that subsequent certificate holders can avail themselves of its voidable character, then the amounts entered under that certificate must be excluded from the aggregate of insurances, and this, as conceded by the counsel for the appellants, will entitle the respondents to judgment. So if, for any reason, the acts of J. Day & Co. are held binding on the defendants, (irrespective of the amounts which had been placed at risk under either policy,) in favor of parties effecting insurance in good faith and without notice that such insurances and the amounts shipped under the same exceeded the nominal amount of the said policies, then the defendants are entitled to judgment.

We, however, concur with the view taken at Special Term, that the plaintiffs here have a right to treat their certificate of insurance as binding the defendants, irrespective of the amount of insurance effected with, or certi-

Mallory *et al.* v. The Commercial Insurance Company.

ificates issued by, J. Day & Co., prior to the issuing of the policy No. 993, dated October 28, 1853, and which is found to have reached Apalachicola Nov. 20, 1853. The certificate issued to the plaintiffs, was in very terms issued under and by virtue of policy No. 993, and was entered upon it and made binding Dec. 31, 1853. It neither accords with justice, nor, as we think, a sound construction of the contracts made by J. Day & Co., to permit certificates issued under and indorsed upon the prior policy, No. 784, to effect the rights of the plaintiffs.

Whether as between the defendants and any parties holding certificates indorsed upon policy No. 784, the recognition of which would make the insurance under that policy, and its renewal exceed the nominal amounts thereof, the defendants are bound by those certificates or not, the plaintiffs had a right to rely upon policy No. 993, as a valid policy from its date, and as one which would cover risks thereafter to be taken under it and indorsed upon it. To the plaintiffs, policy No. 993 spoke from its date, and according to its terms, and bound the defendants accordingly.

The judgment of the Special Term must, therefore, be affirmed.

CHARLES MALLORY *et al.*, Plaintiffs, v. THE COMMERCIAL INSURANCE COMPANY, Defendants.

1. Where a policy of insurance upon freight of a vessel, which at the time of issuing the policy was in the China seas, provided that the voyage should be "confined to the trade between Atlantic ports of the United States, or the ports of London, Liverpool and Havre, and the Pacific Ocean, China seas, including Australia, Van Dieman's Land and ports in the Indian Ocean;"

Held, that this did not, as matter of law, extend to a voyage made by the vessel in question from Liverpool to New York, on her return from the China seas.

2. In an action on such a policy, to recover for a loss upon such voyage, it is for the plaintiffs to show either that there is a single trade between the

Mallory *et al.* v. The Commercial Insurance Company.

Pacific Ocean and China seas, &c., as one terminus, and both the Atlantic ports of the United States and the specified European ports, indiscriminately, as the other terminus; or that the language of the policy, by usage, is understood to include a direct voyage between the Atlantic ports of the United States and the specified European ports.

(Before WEEDRUFF, MONCRIEF and ROBERTSON, J. J.)

Heard, October 17th, 1861; decided, December 28th, 1861.

THIS case came before the Court upon exceptions taken on the trial of the cause, before Mr. Justice PIERREPONT and a Jury, on the 13th day of January, 1860, and which were directed to be heard in the first instance at the General Term, judgment being in the meantime suspended.

The action was brought by Charles Mallory, Charles H. Mallory, Charles Grinnell, Elihu Spicer, Jr., Samuel Willetts, Robert Willetts and David S. Willetts, against The Commercial Mutual Insurance Company, upon a policy of insurance on freight, valued and on time. The form of the policy employed was the ordinary printed one on freight, with printed warranties therein against the use of certain ports in Europe, British North America, the West Indies, America and Asia, and against the carriage of grain in bulk, from certain Atlantic ports of the United States. It also contained a written clause limiting the voyages to which the risks insured against were to attach, in these words: "To be confined to the trade between *Atlantic ports of the United States, or the ports of London, Liverpool and Havre*, and the Pacific Ocean, China Seas, including Australia, Van Dieman's Land and ports in the Indian Ocean." It contained no other description or limitation of the voyage or voyages covered by the policy. At the time of making the insurance in question, the vessel, freight of which was insured, was on a voyage from Singapore to Bombay; from thence she sailed to Liverpool, discharged her cargo, and took on board a new cargo for New York, for which place she sailed, and during the voyage thitherward she was lost.)

The complaint alleged the insurance to have been made against loss on freight of the vessel in question for the time specified "in the trade between any of the following

"ports and places," viz: "Atlantic ports of the United States, the ports of Liverpool, London and Havre, the Pacific Ocean, China Seas, including Australia, Van Diemen's Land, and ports in the Indian Ocean," alleging it to have been made by the policy produced on the trial. It also alleged the employment in such a trade of numbers of registered merchant vessels, for many years before the making of such policy, and at that time; a usage for insurers in the City of New York, to insure persons interested in such vessels, their cargo or freight in such trade, against loss, and to describe such trade substantially by the words used in the policy; and an understanding between insurers and insured that such form described and covered such trade. The complaint, however, did not allege that, if the places between which the trade intended by the policy was to be carried on, were only either the American, Atlantic or European ports named in the policy, on the one hand, and places or ports in the Pacific and Indian Oceans, and China Seas therein designated, on the other, the voyage between Liverpool and New York, in which the vessel was lost, came within such trade.

The answer denied any insurance by the defendants between each and every of the ports and places named in the complaint, as therein alleged, took issue upon the practice, usage and understanding set out in the complaint, and claimed the only voyages upon which the freight was intended to be, or was insured, to be those between Atlantic ports of the United States and the oceans and seas mentioned in the written clause in the policy, and those between the European ports named therein and such oceans and seas.

The policy in question was a renewal of a precisely similar one, except as to premium, ending on the day the former took effect, both of them having been issued on written applications by the plaintiffs' agents; in such applications no mention was made of any trade or voyage to which the risk on the freight to be insured was limited;

Mallory *et al.* v. The Commercial Insurance Company.

but in answer to a question addressed to the assured, at the foot of the first of such applications, the words "*7 pr. ct. to be employed*" was written, and in answer to a similar query at the foot of the second, the words "*Eight per cent clause, 7.*" A book of rates of premiums on risks, established before the making of either policy, was received in evidence "prepared by the underwriters of the City of New York, and printed for their guidance as to the rate of premiums to be charged, as agreed upon between them," not sold, but open for inspection in every insurance office by persons desirous of being insured. The pages in such book were divided into three large columns: the first containing descriptions of the proposed employment of the vessel, and, of the other two, one containing opposite to such descriptions, the rates of insurance for vessels known as clippers, and the other those for vessels which were not so. Each of the last two of such columns were subdivided into four, according to the tonnage of the vessel, the limits of which were placed at the head of such smaller columns. The tonnage of the vessel, the freight of which was insured in this case, did not come between any of such limits. Another similar book of established rates of premium was received in evidence, but its adoption was subsequent to the making of the last policy.

In the first of such books of rates of premiums, the rate of insurance for voyages between the Atlantic ports of the United States and the European ports of London, Liverpool and Havre was one per cent less than that for those between the same Atlantic or European ports, and the oceans, seas and ports mentioned in the policy in question, designating the latter in the same language as is used in such policy; a like difference of premiums was made in the second book, for the same voyages. In such second book, also, opposite to the seventh description of voyages, was written in pencil "No. 7," and also a clause dated several months after the making of the policy in question, excepting from the risk "coastwise, or freighting voyages, in the China Seas or Indian Ocean, disconnected

“from her original voyage, out and back to a port in the United States or a port in Europe.”

More than six months after making the policy in question, an insurance was made by the defendants on the vessel, for the voyage from Liverpool to New York; and a conversation was held at the same time, in which the defendants, being informed that they were insurers on the freight, stated their willingness to increase their line to the amount of both insurances. The agent of the assured was not advised of, and, of course, did not report, on making such second insurance, in what voyages the vessel had then been engaged.

No evidence was given respecting any trade between the ports of the United States or Europe and the ports in the Pacific or China seas; but four questions were put by the defendants' counsel bearing on such trade, which were excluded, and their exclusion excepted to; these were:

I. What, at the date of the policy in question, was the general course of trade pursued by clipper ships of the class of that whose freight formed the subject of insurance in this case, sailing from New York to San Francisco?

II. What, at such date, was the general course of trade of clipper ships of such class, on voyages described in the terms of the policy in question?

III. What, during the time covered by the policy, was the average amount of freight on voyages from Liverpool to New York, of ships of such class?

IV. Whether any practice had grown up under policies containing clauses similar to that in the policy in question, for the assured to obtain permission to make voyages from the European ports named therein to an Atlantic port of the United States?

An offer was rejected, which was made on the part of the defendants, to prove that the valuation of freight in the policy would be excessive for voyages between Liverpool and New York, by vessels of the class of that

Mallory *et al.* v. The Commercial Insurance Company.

in question, but would conform to the average amount of freight of similar vessels on voyages either between the United States' Atlantic ports and the Pacific ocean and Indian seas, including the places named in the policy, or between the ports of Liverpool, London and Havre, and such ocean and seas. An exception was taken to the rejection of this offer.

The Judge before whom the cause was tried, charged the Jury, that it did not appear by the evidence that the ship in question was, at the time of the loss claimed, employed outside of any trade to which she was confined by the policy; to which charge the defendants excepted. A verdict was taken for the plaintiffs for the amount claimed, and the exceptions taken by the defendants on the trial were ordered to be heard, in the first instance, at General Term.

Daniel Lord for the defendants.

I. The terms of the policy are express and unambiguous, giving the *termini* of the trade on one part to be Atlantic ports of the United States, or three named Atlantic ports of Europe, and on the other part to be the Pacific Ocean and its subordinate seas and ports.

1. There was no evidence showing that the trade limited by the policy could embrace a doubling of Atlantic ports on both sides of that ocean.

2. A voyage between the Atlantic-European ports, not shown to be connected with a trade to the Pacific, would not have been within the policy.

3. Nor would a voyage between Atlantic ports of the United States, not shown to be connected with a trade to the Pacific.

Therefore, a voyage between Atlantic ports on both sides of the ocean is equally without the policy.

II. Even if the voyage between Liverpool and New York had been shown to be connected with a particular adventure commencing in the Pacific, the policy would not

Mallory *et al.* v. The Commercial Insurance Company.

have covered it, unless this were a known and common course of trade.

1. "*The trade*" expressed in the policy meant a known trade, not any extraordinary and unusual adventure.

2. By reference to "*the trade*," &c., as a definite thing, the underwriters would be able to determine the voyages, which, in its known course, it would embrace, and they would rate the premium to these risks.

3. The most broad liberties are construed in subservience to the general trade to which the policy is applicable. (1 Arn. on Ins., 373, § 141, and cases cited; *Hamilton v. Shedd*, 3 Mees. & Wels., 49; *Williams v. Shee*, 3 Camp., 469; *Hammond v. Reid*, 4 Barn. & Ald., 72; *Solly v. Whitmore*, 5 Barn. & Ald., 45; *Bottomley v. Bovill*, 5 Barn. & Cress., 210.)

III. The plaintiffs showed affirmatively that the voyage from Liverpool to New York was not connected with the voyage to or from the Pacific Ocean.

1. In Liverpool she took in a full cargo for New York, as a new and independent voyage.

2. It had not even that semblance of a connection with a Pacific voyage, which a final return home might have given it. The insurance was to continue until November 15, 1857, with a power to renew for three months, if on a passage; whereas the Liverpool voyage was to have ended at New York in July.

IV. The evidence offered by the defendants to show what "the trade" between the termini in the policy was, ought to have been received. It was clearly admissible to determine the subject to which the policy applied. (1 Arn. on Ins., 336, § 133, and cases cited; *Uhde v. Warlters*, 3 Camp., 16; *Robertson v. Clarke*, 1 Bing., 445.)

V. The effecting of the policy on the ship from Liverpool to New York, in June, 1857, could not be held to affect the previous policy in question.

VI. The loose conversation at the time of this insurance on ship could not vary the effect of the existing policy.

Charles O'Connor for the plaintiffs.

Mallory *et al.* v. The Commercial Insurance Company.

I. The primary terms of the policy having authorized the plaintiffs to employ their ship in any trade whatever, the restriction upon that right subsequently imposed by the defendants, must be strictly construed as against the defendants. (*Palmer v. Warren Insurance Company*, 1 Story's C. C. R., 362; 1 Duer on Ins., p. 161, §§ 5 and 6; 5 Cranch, 342; 2 Sumner, 375, 380; *Notman v. Anchor Ins. Co.*, 22 Jur. R., p. 714; 1 Burr., 347; 2 Cr. & Jervis, 251.)

The particle "OR" slipped into the clause of restriction by the defendants, cannot have effect to prejudice the plaintiffs.

1. Giving to that particle the effect claimed for it, and necessary to the defense, would render the clause exceedingly obscure and ambiguous.

The acts of the parties under this policy is perfect evidence that the defendant's construction would render it "a mockery, a delusion and a snare." (2 Curtis C. C. R., 616.)

III. The clause of restriction is either insensible and void or it must be construed as allowing a trade between any of the points named. In order to develop this intent, it is only necessary to read "or" as "and." That is frequently done; and it is quite apparent that the New York Board of Underwriters on two occasions, years apart, printed and issued, for the guidance of all insurers, precisely such a clause, using the conjunctive particle in the place where these defendants have inserted the disjunctive.

X ROBERTSON, J. It is plain from the language of the written clause in the policy in question, which determines the employment of the vessel whose freight is the subject of insurance therein, that such employment is controlled by a trade and not mere voyages. A trade between places comprehends voyages between them, but may include something more; especially when so wide a latitude is given to its boundaries as the principal ports in the United States and Europe, and the Pacific and Indian oceans and China seas.

The principal if not only embarrassment in interpreting the clause in question, arises from the difficulty of determining whether a single trade or two trades are described in it. Two different trades, one between the United States' Atlantic ports and the Pacific and other oceans spoken of in such clause, and the other between the therein designated European ports and the same oceans, may be known to dealers in insurance, (*Coit v. Commercial Ins. Co.*, 7 J. R., 385,) or there may be but one kind of trade, in which the same oceans may furnish one of the termini of the voyages in such trade, and the same American or European ports, indiscriminately, the other; and the word "trade," in the singular, may have been employed for that reason. It would also be possible that the course of trade might permit a reinvestment in Europe of the proceeds of a cargo brought from Asia to Europe, in a cargo for the American market so as to preserve the continuous unity of the trade; or it might be only necessary and sufficient for the same purpose to bring to the United States part of the cargo shipped in Asia, after landing another part in Europe; or, *vice versa*, the reinvestment in Europe of the proceeds of a cargo brought from America, in a cargo suited for the Asiatic market, or a reservation of part of it for the final port, might still keep the adventure single, or a round voyage. The Court, however, cannot take judicial notice of the character of such trade or trades, (*Child v. Sun Mut. Ins. Co.* 3 Sandf., 26,) and no evidence was furnished on the trial relating to them; indeed, the defendant was precluded from introducing any evidence on the subject.

On the other hand the plaintiffs did not introduce any evidence, either to show that the loss occurred in any special trade, or to sustain the allegation in the complaint that a trade between each and all of the places or ports named in the policy was usually designated by the terms employed therein. They rest their right to recover, therefore, solely on the position that the word "or," which creates an alternative, is to be read "and," (or rather, perhaps, as there is a subsequent copula, be actually omitted,)—and then, voyages

Mallory *et al.* v. The Commercial Insurance Company.

between any of the places and ports named, and any other of them are to be assumed as intended by "the trade" between them; and they claim that without such a change the clause would be insensible and void, because it contains an alternative without affording the means of determining it.

I do not perceive that the proposed change of substituting "and" for "or," or even dropping the last altogether, without some other change, would materially aid the plaintiffs without some other change, as there are no less than three other "ands" in the sentence, which seriously affect its construction; that one which connects the three named European ports together, literally construed, requires the particular trade to be conducted by voyages between all those ports, and any other named place; while the last one would require the trade to be conducted by voyages between the Pacific ocean, China seas (including the places named) and ports in the Indian ocean, and any other named place. To make the sentence complete, so as to read as the plaintiffs' case demands, it requires the words "or any one or more of them" to be added after the enumeration of the European ports named, and the words "or any where in such oceans, "seas, or ports," after the names of the specified sea or ocean. It would then read, "Between the Atlantic ports "of the United States *and* the ports of London, Liverpool "and Havre, *or any one or more of them*, "and the Pacific ocean, China seas, (including, &c.,) and "ports in the Indian ocean, *or any where in such oceans, "seas or ports."* The voyage in which the vessel in question was actually lost was not in a trade between America and the ports of London, Liverpool and Havre, but between it and Liverpool alone, being only one of such ports. The changes and additions thus rendered necessary for the plaintiffs' purposes seem to be too extensive for any rule of mere interpretation to justify.

But the whole basis of the argument for the necessity of change is removed, if the law furnishes a means of determining the apparent alternative. A right of electing, vested in either party to the contract, would do so. Lord Coke lays

it down, that "in case an election be given of two several things, always he that is the first agent, and which ought to do the "first act, shall have the election." (Co. Litt., 145, a;) and the right of election has been, in numerous cases, held to be conferred on the party to be benefited by a contract, where he is the active party, and such contract is silent as to the party who shall make the election. (*Disborough v. Neilson*, 3 J. Cas., 81; *Smith v. Sanborn*, 11 J. R., 59; *Layton v. Pearce*, Doug., 16; *Small v. Quinoy*, 4 Greenl., (1 Bennet's ed.,) 497.) In regard to policies of insurance, it must essentially be so, and has been adopted without demur; thus, in *Kane v. The Columbian Ins. Co.*, (2 Johns. R., 264,) it was held that where an insurance is to several places, and the assured intends to go to but one of them, he may go there first, at his election, although, if to more than one, he must observe the order in which they are mentioned in the policy. In *Vredenburg v. Gracie*, (4 J. R., 444, n,) the insurance was "at and from any port or ports in the West Indies, and at "and from thence to New York," without the policy containing anything to determine whether the voyage should be from one port or more; and the cargo was held to be covered on a voyage from one port to another in the West Indies. In *Gilfert v. Hallet*, (2 J. C., 296,) liberty was given in the policy to touch at one or two places, the adventure to continue until the landing of the cargo insured, at one or two ports, no mode being specified of determining whether it should be one, or two, and the risk was held to continue after the landing of part of the cargo in one place. By analogy to such cases, a policy of insurance on freight in a trade between the Pacific ocean and American or European ports, or *vice versa*, as in the case before us, could hardly be held to be detached from the freight of that part of a cargo originally brought from the Pacific ocean or America, which should remain after the vessel bearing it should stop and land part of her cargo at a European port, particularly in case of a valued policy. If the vessel was engaged in either of the trades (if there were two) when the loss accrued, the policy should be considered as still attached,

as the stoppage at a port mentioned in the policy with part of the cargo could not well be considered a deviation as to that part which might afterwards be lost in a voyage to another port, (*Keeler v. Fireman's Ins. Co.*, 3 Hill, 250,) particularly where the voyages insured are trading voyages. (*Gilfert v. Hallet*, 2 J. C., 296.) The election to be made may be considered as made when the vessel parts with all the cargo which can characterize the voyages in which she is engaged, as being in the trade between the Pacific ocean and European or American ports, or, as is possible, when she fails to continue that trade, after parting with such cargo, by taking on board a new cargo and sailing on a new voyage in such trade, after which the assured may be considered as having divested himself of the protection of the policy on the freight.

If the order of the termini of the trading voyages had been inverted in the clause under consideration, which, of course, would not alter the sense, I think no doubt could be entertained as to its legal effect. If the employment of the vessel had been confined to a trade between the Pacific ocean, &c., and specified American or European ports, the most natural suggestion to add would be, whichever the assured may select; so that if the insurance was intended to cover the freight only while the vessel was engaged in one of those trades, both parties might allow and agree upon the price of incurring such risk, and fix a corresponding premium. If the vessel should be employed in any other trade of greater or less risk, during the allotted period, her freight could be withdrawn from the protection of such insurance, to be regained upon her re-employment in the specified trade.

Even the rule that words are to be construed in a policy of insurance most strongly against the underwriters, as the promisors, is not applicable upon the question of the obligatory character of the contract as at present worded, and the necessity of a change to give it any effect; such rule is only of value when two interpretations may be given to the same words, and the question is between

them, and not when it is to be determined that no interpretation can be so given to the words as they stand, so as to make a binding contract.

The clause in question does not appear to be capable of the interpretation, that the two trades intended, if there were two, might have been, one between American ports alone, and another between the specified European ports and the Pacific ocean, &c. : Such a construction would require a repetition of the proposition "between," immediately before the names of the European ports, so as to separate the oceans and seas enumerated from the American ports, and prevent the application of the first "between" to them. A contest between Americans or Europeans and Chinese could never be construed, grammatically, to mean a contest between Americans among themselves, or between Europeans and Chinese, and substituting trade for contest, and taking ports instead of people, will not alter the sense.

I do not find, therefore, a necessity existing, in order either to sustain the policy as a binding contract, or to carry out an otherwise manifest intention in the instrument, that there should be a change of the disjunctive into the conjunctive conjunction, or any other alteration in the language. As a commercial instrument in reference to a subject perfectly well understood between the parties themselves, although not expressed with the utmost fullness and accuracy, it is sufficiently capable of definite construction.

I have heretofore examined the question of the construction of the clause in controversy, without the aid of, or reference to, any extrinsic evidence; but what little appears in the case gives some support to the view that, among underwriters and assured, the trade insured was considered as one and entire; in the book of rates introduced by the plaintiffs, a voyage by clippers such as the vessel in question, between London, Liverpool, or Havre and America, was considered a different voyage from those specified in the clause in such book similar to the one under consideration, and subject to a higher rate

Mallory *et al.* v. The Commercial Insurance Company.

of premium ; while the voyages, if there be more than one composing the trade or trades in question, if there be several, are mentioned in one clause ; indeed, the underwriters seemed so much to look upon it as one trade or venture, that they originally connected the mention of the European ports with that of the American by an "*and*," and afterwards changed it to an "*or*," perhaps through apprehension of the application of the very construction now contended for by the plaintiffs. The description also of the voyage as being "*one out and back to a port in the United States or a port in Europe*," in the exception afterwards adopted, is very significant ; it is very clear, however, that in such book of rates, the underwriters, by the clause similar to that in question, did not intend to insure voyages to and fro between New York and Liverpool, disconnected from a trade with the Pacific, China, the East Indies and Australasia. The question, therefore, put by the defendants' counsel, as to the course of trade of such vessels as that in question, on voyages between either the United States Atlantic ports or the European ports named in the policy, and the Pacific ocean and other places named therein, was pertinent to show what was meant by the trade mentioned in the policy, whether there was one trade or two, or one was part of the other, and it should have been allowed. Perhaps the plaintiffs were bound in the first place to show what the trade was, and that they were within the terms of the policy, in order to recover at all ; and, perhaps, they may be able to establish the allegation in the complaint, that a trade, such as they were engaged in at the time of the loss, was usually described by underwriters and assured in the terms of the policy : both these matters can be better determined on a new trial. If the defendants do not choose to rely upon the interpretation of the clause as it stands, as giving the plaintiffs an election to choose the trade in which they would employ the vessel, if there were two mentioned, they also have a right to introduce testimony to show whether there are not two distinct trades known to persons dealing in insurance, or

Mallory et al. v. The Commercial Insurance Company.

only one, and that there is in fact no alternative in the clause in controversy.

There must, therefore, be a new trial, with costs to abide the event.

WOODRUFF, J. I concur in the conclusion that there must be a new trial, on the ground that if the construction of the defendants' contract is to be determined by the mere terms of the policy, according to what appears to me their natural and obvious signification, the trade in which the vessel was to be employed, while the insurance should operate, was that wherein the *termini* were, on the one hand, Atlantic ports of the United States, or the ports of Liverpool, London and Havre; and, on the other hand, the Pacific ocean, China seas, and ports in the Indian ocean.

A well established course of "trade" may have given a construction to the terms employed, so that trading voyages from port to port, in either ocean, and permission to touch or lie at such ports, would be included, or so that United States vessels insured here might begin and terminate their voyages when entering upon or ending their trade between the Atlantic ocean and the other oceans mentioned, by going first from an Atlantic port in the United States to London, Liverpool and Havre, and by returning from the latter ports to the United States, (such passage across the Atlantic being connected with and forming a part of the trade between the Atlantic and Pacific ports, and being only incidental to the main purpose of the adventure or adventures.)

If the terms employed have, by usage, acquired a technical meaning more comprehensive than their natural and ordinary import, I think it was not necessary that the defendants should give the evidence thereof, but they might safely rest on the language of the policy, and leave the plaintiffs to proof that a trade such as the policy describes includes, as incidental to or forming part of it, a direct voyage between Liverpool, London or Havre and New York, or other United States port on the Atlantic.

Pollak v. Gregory *et al.*

If the proper preliminary foundation for giving parol evidence to vary the construction of the language of the policy was made, then it might be received; but, on the case, as it was presented to the Court on the trial, I think it was erroneous to declare, as a judicial construction of the policy, that a voyage from Liverpool to New York was not outside of any trade to which the vessel was confined by the policy, and at the same time exclude evidence of the course of trade.

New trial ordered.

ANTHONY POLLAK, Plaintiff and Appellant, v. IRA W. GREGORY *et al.*, Defendants and Respondents.

1. An agreement by which a person is to be paid a stipulated sum for giving testimony, on the condition that it leads to the termination of a suit favorable or satisfactory to the other contracting party, who is a party to such suit, is illegal and void.
2. Where parties to an action involving the question of the validity of a patent, entered into an agreement with one who was qualified to testify as an expert, by which the former paid the latter \$1,000; and, further, agreed to pay him \$2,000, upon the condition that the information possessed by him, or the testimony given by him, should enable them to succeed in the action; and, further, agreed to pay him his traveling expenses, and the usual per diem of an expert; he agreeing, in consideration of the premises, to "hold himself at all times in readiness to give his testimony, or to impart his information, as above, as an expert in said matters:"

Held, that the whole agreement was void; and that he could not recover even his fees as expert and his traveling expenses. ROBERTSON, J., dissented.

(Before BOSWORTH, Ch. J., HOFFMAN and ROBERTSON, J. J.)

Heard, December 2d, 1861; decided, December 28th, 1861.

This was an appeal by the plaintiff from a judgment entered in favor of the defendants, upon an order dismissing the complaint, made on the trial before Mr. Justice WOODRUFF and a Jury, on the 20th day of May, 1861.

The defendants were Ira W. Gregory, James E. Kelley, William C. Watson and George H. Wooster. The action is brought on an agreement, which was as follows:

Article of agreement, made and entered into this fourth

day of September, A. D. one thousand eight hundred and fifty-seven, between William C. Watson, George H. Wooster, Ira W. Gregory, and James E. Kelley, all of the City of New York, party of the first part, and Anthony Pollak, of the City of Washington, party of the second part, Witnesseth:

That whereas, the said Pollak is in possession of certain knowledge and information on the subject of sewing machines, which has been recently obtained by him at a large outlay of both time and money, and which the party of the first part have, by their counsel, Joseph P. Pirsson, been advised is of great importance to them in certain suits or issues at law, and pending or about to be made, to which either themselves or others with whom they are interested are parties.

And whereas, the said party of the first part are desirous of availing themselves, in said suits or issues, of the knowledge and information of said Pollak, the said parties of the first and second part have agreed as follows:

Firstly. The said party of the first part will, upon the sealing and delivery of these presents, pay over to the said Pollak, as on account of moneys already expended by him, the sum of one thousand dollars, and will pay hereafter, that is to say, so soon as the said suits shall have been terminated in favor of said party of the first part, whether by an issue or trial at law, or by negotiation, or in any other manner, the further sum of two thousand dollars, which said further payment shall be upon the condition that the information possessed by the said Pollak, or the testimony given by him, shall have been such as has led to the satisfactory termination of said suits to the interest of said party of the first part.

And they will also pay from time to time to said Pollak, during the progress of said suits, all his actual traveling expenses, and the usual per diem (twenty-five dollars) of a scientific expert, while acting as such for said party.

Secondly. The said Pollak, in consideration of the premises, and of the aforesaid sum of one thousand dollars,

Pollak v. Gregory *et al.*

the receipt of which upon the sealing and delivering of these presents he does hereby acknowledge, will hold himself at all times in readiness to give his testimony, or to impart his information as above as an expert in said matters.

In witness whereof, the said parties have hereunto set their hands and seals, the day and date first above written.

Signatures.

Under this agreement the plaintiff claimed to recover the following items, with interest:

1. The sum of two thousand dollars mentioned in the above agreement.

2. For attending, between September 4th and 15th, 1857, as a scientific expert, for eight days, in the suits mentioned in the agreement, two hundred dollars.

3. For traveling expenses, incurred in pursuance of the agreement, sixty dollars.

Payment of the sum of one thousand dollars mentioned in the agreement, by defendants to the plaintiffs, was admitted.

E. Hoffman, for plaintiff, (appellant.)

- I. The contract was not void in any respect. Plaintiff performed, and was entitled to recover. (Curtis on Patents, § 180, and note, and § 321, and note; *Spencer v. King*, 5 Ham., 183; 1 Pickg., 415; 14 N. Y. R., 289.)

- II. At all events the covenants to pay twenty-five dollars per day as an expert, and his traveling expenses, are not tainted with illegality, are distinct and capable of separation from the illegal part, and not dependent upon the termination of the suit in the United States Court, and should therefore be upheld. (1 Williams's Saunders' Reports, p. 66, note; 6 Taunton, 359; *Jarvis v. Peck*, 1 Hoff., 479; 11 Moore, 483; 13 Wend., 53; 4 N. H., 285.)

Charles Jones, for defendants, (respondents.)

- I. The contract is illegal and void.

1. It is for the services of plaintiff as a witness in a suit, and provided that the money should be paid only upon the

condition that the information possessed by the plaintiff or the testimony given by him should be such as had led to the satisfactory termination of the suits to the interest of the defendants.

The only service proved is that the plaintiff made his affidavit, which was used on a motion in one of the suits.

2. The contract is illegal upon the ground—

(a.) That the fees of a witness are fixed and regulated by law, and no other fees can be recovered than those prescribed by the statute.

(b.) The contract in terms provides for payment only in case the testimony enables the party to succeed.

(c.) Every person having knowledge of any matters involved in a suit, is bound to impart it without further compensation than the law provides. (Laws of U. S., ch. 80, (1853); Chitty on Cont., 5th Am. ed., 587; Addison on Cont., 2d Am. ed., 96; *Willis v. Peckham*, 1 Brod. & Bing., 515; *Collins v. Godefroy*, 1 B. & Ad., 950; *Hatch v. Mann*, 15 Wend., 44; *Gray v. Hook*, 4 Comstock, 449; *Davison v. Seymour*, 1 Bosw., 88; *Stanley v. Jones*, 7 Bingham, 369; 1 Parsons on Contracts, 380; *Burth v. Place*, 6 Cow., 431; 17 Barb. S. O. R., 397.)

II. The contract was not performed. There was no termination of the suit as therein provided for.

BOSWORTH, Ch. J. The plaintiff testified that "the testimony mentioned in the agreement" sued on, "was intended to be an answer to the Morey and Johnson patent," which patent the present defendants were charged with infringing. By the agreement in question, the defendants covenanted to pay the plaintiff \$2,000, "upon the condition that the information possessed by the said Pollak, or the testimony given by him, shall have been such as has led to the satisfactory termination of said suits, to the interest of said" defendants; and also to "pay, from time to time, to said Pollak, during the progress of said suits, all his actual traveling expenses, and the usual per diem (\$25) of a scientific expert, while acting as such for said" defendants.

Pollak v. Gregory et al.

The plaintiff covenanted to "hold himself in readiness at all times to give his testimony or to impart his information as above, as an expert in said matter."

He brings this suit to recover the \$2,000, and also \$200 for eight days' attendance in New York as an expert, between the 4th and 15th of September, 1857, on a motion in the U. S. Circuit Court for an injunction in one of the suits named in said agreement, and the further sum of \$60 for traveling expenses.

At the time when the plaintiff charges for attending as an expert, he made an affidavit in behalf of the defendants, which was read on said motion, and he testifies that he made it "in accordance with the terms of the said agreement." It bears date September 10th, 1857, and the motion was made on the 12th.

I think no one, carefully reading the agreement, can doubt that the plaintiff would never have agreed to attend as a witness, and impart as such the information which he had, upon an agreement merely to pay his traveling expenses, and \$25 per day. If he would, the present defendants had no inducement to pay \$1,000 down, or agree conditionally to pay \$2,000 more. It is a just inference that the plaintiff insisted upon all the conditions and stipulations in his favor which the agreement contains.

And I think it equally clear that both parties contemplated that one mode of Pollak's imparting his information, and the important and efficient mode, would be, his testimony as a witness on the stand, and by affidavits, to be used, whenever affidavits could be used, according to the practice of the Courts; that it is an essential ingredient in every part of the agreement that his information is to be presented by him as a witness, although it was also to be stated to counsel in consultations and otherwise, as might be useful; and that the agreement to pay the \$25 per day and traveling expenses, was essentially induced by the conditional bonus for which he stipulated, and which all parties expected he would earn by giving testi-

mony which would, according to the terms of the agreement, entitle him to it.

This idea is enforced by the circumstances under which the claim is made in this suit for eight days' attendance. The complaint alleges that Pollak attended on those days "in pursuance of said agreement, * * as a scientific expert." He testifies that he so attended as an expert; but he further testifies that he then, "in accordance with the terms of said agreement, made an affidavit which was used on the 12th of September, 1857, in behalf of the said defendants on a motion argued during such attendance."

This implies that he considered it a part of his duty as a scientific expert under such agreement, to give testimony and make affidavits, and in that way impart information in execution of the contract on his part.

I therefore regard the consideration entire, and the agreement in its object and purpose indivisible. (*Barton v. Port Jackson, &c.*, 17 Barb., 397, and cases there cited.)

An agreement by which a person is to be paid a stipulated sum for giving testimony, on the condition that it leads to the termination of a suit favorable or satisfactory to the other contracting party, (who is a party to such suit,) is illegal and void, as having a direct and manifest tendency to pervert the course of justice. (*Stanley, adm'r, v. Jones*, 7 Bing., 369.) Such an agreement as strongly contravenes public policy, and is as deserving of condemnation, as that denounced by Lord Chief Justice WILMOT, in 2 Wilson's R., 349, (*Collins v. Blantern*.)

In *Yeatman v. Dempsey*, (7 J. Scott, N. S., 628,) there was no condition in regard to the effect or results of the defendant's testimony. His right to compensation for his time and expenses, and professionally, was not made dependent on any such condition. And in that case, when his counsel, *arguendo*, stated the proposition, viz.: "A contract such as this, which almost amounts to a conspiracy to get up a case against the lady, is manifestly contrary to public policy;" he was answered by ERLE, Ch. J., thus: "There is no plea of illegality, and no point

Pollak v. Gregory *et al.*

of this sort was reserved; it therefore is not open to you." (*Id.* 634.)

There is nothing in the facts of that case, nor in anything said by the Judges, which militates at all against the decision in *Stanley v. Jones*, (*supra.*)

Any agreement which has a direct and manifest tendency to pervert the course of justice, is illegal and void. By the agreement in question the plaintiff, as a condition to earning his \$2,000, is to give testimony which will produce a stipulated result. The pernicious tendency of such a contract is so obvious, that it is unnecessary to state it. And, as an integral part of the same contract, he is to hold himself in readiness to give his testimony, or impart his information as an expert, either in the form of affidavits to be made a basis of judicial action, or orally as a witness upon the stand. The whole agreement is void.

The interest of the State to convict persons guilty of crimes, is the reason of the rule which authorizes a reward for information that will establish their guilt. If it so happen that the person earning the reward becomes necessarily a witness, that result is accidental, and the objection goes to his credit and not to his competency.

With the wisdom of that rule we have nothing to do. It is a special case founded on considerations of public policy; and whether public justice as a whole is subserved by it, is a question which does not affect the case before us. (1 Greenl. Ev., § 411.) If the rule is to be abrogated or modified, it must be done by the Legislature and not by the Courts.

I think the judgment should be affirmed.

HOFFMAN, J. The agreement, which is the subject of the present action, may be analyzed and developed into the following statements and stipulations:

A statement and admission by the defendants that the plaintiff was in the possession of certain knowledge and information on the subject of sewing machines, which had

Pollak v. Gregory et al.

been obtained by him at a large outlay of time and money, which was of great importance to the defendants in certain suits then pending, in which they were interested as parties, and that they were desirous of availing themselves of such knowledge and information in such suits.

A sufficient admission by the defendants, that the plaintiff was an expert, and competent to render beneficial services as such.

An agreement by the defendants that they will, upon the delivery of the instrument, pay the plaintiff one thousand dollars, as on account of moneys already expended by him.

Another stipulation by the defendants, that they will thereafter pay, that is, as soon as the said suits shall have been terminated in favor of the defendants, in any manner, "the further sum of \$2,000, which said further payment shall be upon the condition that the information possessed by the said Pollak, or the testimony given by him, shall have been such as has led to the satisfactory termination of said suits, to the interest of the said party of the first part."

"A further agreement by the defendants to pay, from time to time, to said Pollak, during the progress of said suits, all his actual traveling expenses, and the usual per diem (\$25) of a scientific expert, while acting as such for said defendants." Then, secondly, in a distinct paragraph, Pollak covenants, in consideration of the premises, and of the aforesaid sum of \$1,000, that he "will hold himself, at all times, in readiness to give his testimony, or to impart his information as above, as an expert in said matters."

Let us suppose that the whole contract was the recital of the plaintiff's knowledge and qualifications, his agreement to impart it, and to testify as an expert, and then the stipulation by the defendants to pay the \$1,000, and the \$2,000, upon the condition in the first clause of the first article of the agreement. I have a strong opinion that such a contract could not be sustained; and hence that, so

Pollak v. Gregory *et al*

far as the \$2,000 is sued for, this action will not lie. It is unequivocally an engagement with Pollak to pay that sum of money to him, if the defendants find it expedient to examine him, and they win the cause through his testimony. It is true the information possessed and imparted might have been sufficient to secure a favorable result, without examining him, but yet the covenant is plainly this: If it is found necessary to use you as a witness, you shall have \$2,000, provided the cause is won by your testimony.

I cannot think it safe to test the validity of such a contract, either by any speculation as to the nature of the evidence the party can give, or by the character of the evidence actually given by him on a trial. It may be, that there was no necessity for calling the plaintiff as a witness, except to authenticate the copy of the specification. It may be, that nothing else was anticipated, but it cannot be said that the necessity or utility of a far more extended examination might not arise. The agreement covers this contingency, tempting the party to partial or false testimony. A contract like this is against public policy by the common law, because it injuriously affects the administration of justice. (14 N. Y. R., 289, 292.)

In *Stanley v. Jones*, (7 Bing. R., 369,) the agreement to communicate such information as would enable the party to recover a sum of money by action, and to exert influence to procure evidence to sustain the claim, upon condition of receiving a portion of the sum recovered, was adjudged illegal. After discussing it as a case of champerty, the Court say: "If there is any difference between this contract and direct champerty, it appears to us to be strongly against the legality of the contract, as the bargain to furnish and procure evidence for the consideration of a money payment in proportion to the effect produced by such evidence, has a direct and manifest tendency to pervert the course of justice."

The position thus taken is not at variance with the decision in *Yeatman v. Dempsey*, (7 J. Scott, N. S., 628.)

Services had been rendered in collecting testimony, and time employed and money spent, with a promise to attend the trial, upon an engagement by the plaintiff to compensate the defendant, a medical man. Such a contract, the case upholds. Such a contract is free from the vice of making compensation to depend upon the force of the testimony of the witness.

But, secondly, in my opinion, a contract single and independent, limited to the recital in the present agreement, to a stipulation by Pollak to hold himself at all times in readiness to give his testimony, or impart his information as an expert, and a covenant by the defendants to pay him from time to time his traveling expenses, and the \$25 per day for his services in aiding counsel, and his assistance generally, would be valid and binding. (*Yeatman v. Dempsey*, 7 J. Scott, N. S., 628; *Webb v. Page*, 1 Carr. & Kir., 23.) These cases are not at variance with the authorities which hold, that upon the taxation of costs against an unsuccessful party, there cannot be an allowance to experts for time spent in experiments, &c., to prepare for the trial, except in the case of medical men. (*Severn v. Olive*, 3 Brod. & Bing., 72, and the cases cited.)

In my judgment, there would be a right of action upon a contract so restricted.

Can, then, this agreement be so severed in its parts, as to allow that to be sustained which if it stood alone would be valid, and that to be rejected, which, by itself, is illegal? I think this is the only question of doubt in the case.

The forms in which illegality is traceable in a contract, may generally and in substance be thus stated. Either there is illegality in the consideration for the undertaking, which a party is called upon to perform, or is sued for not performing; or illegality in the stipulation he has made, though none in the consideration. Again, there are modifications of such cases; as where there are several considerations for the thing undertaken, some of which are legal and others illegal; or several undertakings of the party sued, some lawful and others unlawful, yet on one

valid entire consideration; or several undertakings with some valid and other invalid considerations.

The case of *Arkwright v. Cantrell*, (7 Ad. & Elms, 565,) is an example of a consideration being wholly valid, and part of the grant or subject transferred invalid, and the rest legal. It was sustained for the legal portion. In consideration of a fine and rent, the lord of a manor granted the mines in a district, and the office called bar-master, grantable by him. Such officer was to supervise the mines and to do justice between miner and miner, as well as between miner and the lord. The grant of the office was held void from incompatibility with the interest taken as lessee or farmer.

Nicholls v. Stretton, (10 Queen's Bench R., 346,) is a case similar in principle. The consideration for various covenants was one and the same, and was legal. A covenant to do business for existing clients was sustained; one relating to future clients was rejected as invalid. They admitted of separation.

So also in *The Bank of Australasia v. Breillat*, (6 E. F. Moore-Priv. Coun. R., 152,) the Court say: "From *Pigot's case*, (11 Coke's R., 26,) to the latest authorities, it has always been held, that when there are contained in the same instrument distinct engagements, by which a party binds himself to do certain acts, some of which are legal, and some illegal at common law, the performance of those which are legal may be enforced, though the performance of those which are illegal cannot."

In the same instrument, directors had bound the company to payment of money used for proper purposes, and had attempted, also, to bind it to other covenants, which were assumed to be *ultra vires*.

There is much variety of authority upon the point whether, if the promise sued upon is entire, and one of several considerations moving it is illegal, an action can be sustained, there being also a good consideration.

In *Deering v. Chapman*, (9 Shepley R., 488,) a promissory note was given partly for spirituous liquors sold in

Pollak v. Gregory et al.

violation of a statute, and partly for proper items of demand. It was held that the note was wholly void. No action could be supported for part.

In *Woodruff v. Hinman*, (11 Vermont R., 592,) the action was upon a promissory note, the principal consideration of which was the costs and expenses of a criminal prosecution, improperly discontinued. The sum of \$10 was included, on a legal demand. No action could be supported. If part of the consideration was simply invalid, it would do; not, when it was contrary to law.

Burt v. Place, (6 Cow., 431,) is strongly in point to the same effect. The illegality was a violation of a statute.

In *Jarvis v. Peck*, before me as Assistant Vice Chancellor, (1 Hoffman's R., 479,) it was held, that when it is evident an agreement has been made upon considerations, one of which, if it stood alone, would have supported the contract, its union with an invalid one shall not destroy the contract. With an exception where the contract contains a provision violating a positive statute, and another exception, where it is for an act *malum in se*, I consider this conclusion most consonant to the principles of justice, and at least as consistent as the opposite doctrine with the analogies of law.

When the case was before the Chancellor on appeal, he affirmed the decree on one ground, and observed that it was not necessary to consider this question. "It would be seen, however, by a reference to the case of *Bunn v. Guy*, as reported by Mr. Smith, that Lord ELLENBOROUGH takes that ground distinctly. His Lordship, at the conclusion of his argument, says: 'Here is a bond for the payment of money, and unless the consideration is bad by the statute, the bond is good, if any part of the consideration is good.' See 1 Smith's R., 11. A similar opinion was expressed by him in the case of *Newman v. Newman*, (4 Maule & Selwyn, 70.)"

In *Carleton v. Woods*, (8 Foster's N. H. R., 290,) notes were given for goods sold. They included sales of spirit-

Pollak v. Gregory *et al.*

uous liquor, made illegal by a statute. Under the money counts, it was held, that a recovery could be had for the other articles. There was a divisible contract.

Yundt v. Roberts, (5 Serg. & Rawle, 139,) was the case of a note, given for a tavern reckoning, which, exceeding twenty shillings, was void by statute. It included other items of account, unobjectionable. It was held good for the latter.

In *Frazier v. Thompson*, (2 Watts & Serg., 235,) the defendants had purchased goods at different times of the plaintiff. He bought also pills alleged to have been spurious, and fraudulently imposed upon him. This purchase amounted to \$150. The note was for \$400. A judgment on verdict for the balance was affirmed. The contracts were separate and distinct. The good could be separated from the bad. It made no difference that the contracts were made at the same time, provided the considerations were not so blended as to form but one consideration.

Mr. Chitty (On Contracts, 657) says, that the test whether a demand connected with an illegal transaction is capable of being enforced at law is, whether the plaintiff requires any aid from the illegal transaction to establish his case.

This is approved by the Court in *Rose v. Truax*, (21 Barb., 361,) in *Buck v. Albee*, (26 Vermont R., (3 Deane,) 184,) and in *Gray v. Hook*, (4 Comst., 449.)

The summary of part of the law on this subject seems to me well stated in *Rose v. Truax*, *ut supra*. "If any part of an indivisible promise, or any part of an indivisible consideration for a promise, is illegal, the whole is void, and no action can be maintained on it. An illegal element being incorporated in an instrument, in which the bargain is one, the consideration one, and the covenant one, the whole is vitiated."

I refer also to the strong language of COMSTOCK, Justice, in *Curtis v. Leavitt*, (15 N. Y. R., 1-96.) Mr. O'Connor's able and full argument led to this conclusion: "A doc-

trine which is expressed in the words, 'void in part void in toto,' has often found its way into books and judicial opinions, as descriptive of the effect which a statute may have upon deeds or other instruments which have in them some forbidden vice. There is, however, no such general principle of law as the maxim would seem to indicate. On the contrary, the general rule is that if the good be mixed with the bad it shall nevertheless stand, provided a separation can be made. The exceptions are: First, where a statute, by its express terms, declares the whole deed or contract void, on account of some provision which is unlawful; and, second, where there is some all-pervading vice, such as fraud, for example, which is condemned by the common law, and avoids all parts of the transaction, because all are alike infected."

But the case becomes complicated when we find one of several covenants in an agreement perfectly lawful, induced by several considerations, some of which are good, and others illegal, and other illegal covenants induced by the same considerations. I confess I think that the true rule, even here, would be that we can apply what is valid as a consideration, to what is valid as a promise, unless the instrument shows plainly that the good promise would not have been made without the unlawful consideration predominating, or at least concurring.

But if the legal undertaking is severed, or fairly severable and distinct; if the legal consideration is also severed or severable; if, without dealing arbitrarily with the language of the contract, we can conclude that the lawful motive influenced the lawful stipulation, without being compelled to find that the unlawful one necessarily combined in producing it, then, in my view, an action on such stipulation can be sustained. By this principle I proceed to test the agreement in question.

Nothing can be more clear upon the face of this instrument than that the parties meant to give to the plaintiff a distinct right of action for his per diem allowance and expenses, from time to time. An action could have been sustained for a demand of this nature prior to the termina-

tion of the suits in which the defendants were engaged. Successive actions could have been sustained as a further allowance became due, and further expenses were incurred. This obligation, then, was distinct, independent, and unconnected with that which rested upon the successful termination of the suits. This obligation was valid, and a Court would be bound to give it effect. It is separated in the mere point of position in the document from the other undertakings of the defendants. It is separable in its nature and subject matter. It is capable of being taken as a distinct engagement, without affecting the other engagements of the defendants, and without it being necessary, to consider such engagements, to judge of this.

Thus far there seems little difficulty in the case.

It is also true, that there is to be found a lawful consideration for this lawful engagement, in the undertaking of Pollak "to hold himself at all times in readiness to give his testimony, or to impart his information *as above*, as an expert in such matters."

But, to sustain this view, we must discard the apparent meaning of the words "*as above*," and not refer them to the giving of such testimony as shall produce success. And if this were permissible, we have yet to say, that the unlawful undertaking to testify did not combine with the lawful consideration in leading to this promise of the defendants. I think this cannot be said. On the contrary the result of my reflection is, that the defendants would not have engaged to pay the *per diem* allowance and expenses, if this undertaking to testify had not been in the contract. The fidelity to the promise so to testify, as well as the readiness to give the information possessed, and render the services, previous to trial, were bargained for and secured by this allowance, as much as the \$2,000 was bargained for upon success attending the testimony. I cannot but conclude, that the illegal consideration not only did concur to induce this promise, but really was the predominating motive for making it.

The judgment must, therefore, be affirmed.

ROBERTSON, J. On the face of the instrument in suit it would seem that the main object of the defendants was thereby to secure the benefit of the information acquired by the plaintiff. The recital is confined to it, the first condition of the defendants' liability is its communication to them, and plaintiff covenants to impart it. The obligation of giving testimony or aid as a scientific expert holds a secondary position, and inasmuch as the defendants were ignorant of the nature of the information, would appear to be inserted only for greater caution, in case it became necessary. By extrinsic evidence only we discover that, while the information consisted of knowledge of the existence of a patent prior to that claimed in the litigation recited to be then pending, the testimony of the plaintiff to establish the accuracy of the copy of the patent and specifications might be found useful; such testimony, however, although useful, does not appear to have been indispensable, for, in case of the plaintiff's death, absence or refusal to testify, another witness might have proved the same thing. The main point was to learn the existence of such a patent and where to find it. If that had been known to the defendants, they would certainly not have agreed to pay anything like \$3,000 for the testimony, and probably not more than the *per diem* allowance and traveling expenses. These preliminary remarks are rendered necessary by the great stress laid on the fact that one of the conditions of the defendants' liability was giving testimony by the plaintiff, and its treatment as the predominant purpose of the instrument, and as indispensable to enable the defendants to accomplish the object they had in view in making the agreement.

The giving of testimony by the plaintiff is not, by the terms of the instrument, a necessary condition of the defendant's liability; he might even die before it could be given, and yet his representatives could recover if the necessary information was given; it is but one of the conditions on which the defendants would be liable; the alternative one is imparting information already acquired

Pollak v. Gregory et al

by the plaintiff, provided it be such as to lead to a successful issue in the pending litigation. The independent covenant of the plaintiff, merely to hold himself in readiness to give testimony generally, might expose him to a recoupment in damages, but would not by implication render such testifying a condition precedent to the right to recover; because the parties, having expressly declared what those conditions should be, that expression necessarily excludes any implication. No construction of the covenant could make it necessary for the plaintiff to give testimony as well as information, to entitle him to recover, if the latter be sufficient to assist the defendant in successfully defending himself against the pending claims; nay, even if the testimony given by the plaintiff was hostile to the interests of the defendants, he would still have the same right, provided they were successful and the information given by him contributed to such success. The compensation, therefore, was not for both united, but for either one, which formed the condition of the right to recover; and there is no room for inferring, in a case where the plaintiff could recover by simply establishing his communication of the efficacious information, without having given any testimony, that his becoming a witness constituted any part of the consideration for such liability. The only embarrassment in the case arises from the fact, that apparently the same sum of money is to be paid in either event, whether the plaintiff only gives the desired information or testifies also; but this difficulty is easily solved, as it is only one of construction, for it will be found that although numerically the sum is the same, yet in legal character it becomes two sums in reference to the consideration; one being a compensation for giving valuable information, on which alone the right to such compensation depends, and the other a compensation for giving testimony, on which alone the right to that compensation depends. There is no question that the parties in this case could have entered into two separate stipulations, by one of which the defendant should agree to pay

\$3,000 for the desired information, and by the other the like sum for the desired testimony, and have provided that a recovery or payment upon either should be a satisfaction of the other liability. The covenant in question does no more, and is but a grammatical condensation of such stipulations; the creation of an alternative by a disjunctive conjunction must operate entirely to separate, in meaning and effect, the two branches of the covenant. They become, in fact, two covenants, with a different consideration for each, entirely disjoined, both in the basis and proof of the covenantor's liability, so that either might have been omitted, and left the other to stand upon its own merits. This is the natural interpretation of the clause in question; but, were it otherwise, the rule is well settled that any reasonable construction is to be adopted to prevent a contract from failing by reason of illegality. (*Ld. Howden v. Simpson*, 10 Ad. & El., 793; *S. C.*, 37 Eng. Com. L., 249.)

It remains to be seen, therefore, only how far the introduction of an illegal stipulation, or consideration, in an instrument, or a clause of it, affects such instrument or clause. And upon this point the general rule is that the common law struggles to sustain every part of an instrument from which the illegality can be extracted; it is only a statute which makes the whole void by reason of the illegality of one of its parts. (*Pigot's Case*, 11 R., 26; *Bank of Australasia v. Breillat*, 6 E. F. Moore's (P. C.) R., 152; *Curtis v. Leavitt*, 15 N. Y. R., 91.) Illegality, at common law, vitiates a contract only in two cases, to wit, where the act to be performed is illegal or the consideration is so. In *Rose v. Truax*, (21 Barb., 361,) the test is declared to be the inseparability of the legal from the illegal parts of the undertaking, or the indivisibility of the consideration; so that if one undertakes to do an illegal as well as a legal act for a legal consideration, or a legal act for a consideration partly legal and partly illegal, and there is no mode of determining in the first case how much of the consideration was for the act which was legal, and in the second

Pollak v. Gregory *et al.*

case how much of the act was for the part of the consideration which was legal, that contract becomes invalid. Some cases do not even go as far as this: for in *Bunn v. Guy*, (1 Smith's R., 11,) Lord ELLENBOROUGH held a bond to be good, if any part of the consideration was good, unless a statute interfered, and he reiterated the same view in *Newman v. Newman*, (4 Maule & Selw., 70.) The same doctrine was held by one of my brethren, when Assistant Vice Chancellor, (*Jarvis v. Peck*, 1 Hoffm. Ch. R., 479.) In the cases of *Carleton v. Woods*, (8 Foster, [N. H.,] 290,) *Yundt v. Roberts*, (5 Serg. & Rawle, 137,) and *Frazier v. Thompson*, (2 Watts & Serg., 235,) the contract was apportioned for the legal consideration, it being in the form of a promissory note. In *Arkwright v. Cantrell*, (7 Ad. & El., 565,) and *Nicholls v. Stretton*, (10 Q. Bench R., 346,) although the consideration was entire, the illegal act to be done was rejected and the rest left valid. In *Deering v. Chapman*, (9 Shepley, 488,) *Woodruff v. Hinman*, (11 Vt., 592,) and *Burt v. Place*, (6 Cow., 431,) the contract was declared void, because part of the consideration was in violation of a statute. It may be doubted, however, whether those last three cases are not contrary to the current of authority, and whether they do not confound the cases where a statute merely forbids an act, with those where it makes a whole instrument void which attempts to carry it out, whatever legal stipulations it may contain. In this case, however, the instrument itself separates the two parts of the contract, or rather makes two for two different considerations; and, although it stipulates only to be liable for but one payment, even if both acts constituting the different considerations be done, yet it also requires only one of those acts to be done to entitle the plaintiff to recover. It clearly stands the test furnished by Mr. Chitty to discover whether any part of a contract be illegal, to wit, that the plaintiff requires no aid from the illegal part to secure his right to the legal. (Chit. on Cont., 5th Am. ed., 657.) That test is also approved of in *Gray v. Hook*, (4 Comst., 449.) It is to be observed in this case, that the seal to the

instrument is sufficient consideration for the performance of the covenant by the defendant, and that the communication of the desired information, or giving the beneficial testimony, are made mere conditions. It is true that if the only condition were to give the required testimony, and that were illegal, the Court would have a right to presume the giving of such testimony to be the consideration of the covenant; but where there is another condition, on the performance of which alone the plaintiff is to become entitled to the same amount, and which is perfectly legal, it cannot be said that from the face of the instrument the Court have a right to presume that the consideration of the covenant was an undertaking to give testimony beneficial to the defendants. It is to be recollected that it is a covenant of the latter, who are entirely ignorant of the nature of the plaintiff's information, and whether his testimony would not or would be needful; and even if the plaintiff knew that the condition as to the testimony was illegal, and that he could not recover if that were the consideration, but that such testimony was not indispensable, he had a right to risk his right of compensation upon the other ground of the practical effect of his mere information. If there were an answer setting up an illegal contract *dehors* the instrument, and there was extrinsic evidence to prove it, of course the mere seal would prove no barrier in this case to such a defense; but there is no such defense, and no such proof, and the defendants rely on the legal interpretation of the instrument itself to make the covenant void. The plaintiff, therefore, derives no aid from the supposed illegal part of the instrument, according to its legal interpretation, in order to be entitled to compensation for giving his information; he is not bound by the conditions to give his testimony at all in order to receive that compensation, and were it not, in fact, that his affidavit is introduced, as the mode and evidence of his communicating the desired information, there would be nothing to show that he gave his testimony; at all events, it was not necessary for him to rely on it as testi-

Pollak v. Gregory *et al.*

mony, even if it were so, which it probably was not within the meaning of the covenant, as it was not on a trial, although the result of the disclosure was to induce the defendants' adversaries to abandon the litigation. Whether it came within the other description in the covenant, is another question. At all events, what has been said is sufficient to show that the plaintiff's right to recover on the face of this instrument, according to the legal force of its proper interpretation, requires no aid from his giving testimony.

I have referred to the separate covenant of the plaintiff, in the same instrument, "to hold himself in readiness to give his testimony, OR impart his information as above as an expert," as not furnishing by implication the consideration for the defendants' covenant. But if it were the only place where we could look for a consideration standing by itself, it could not be construed to mean to give only favorable testimony; which would be his going out of the way to make the contract illegal. In fact, it is hardly a covenant to give testimony, which he could be compelled to do, but merely to be in a position to give it when called on. The words "*as above*" clearly refer only to the information, since the defendants, being declared to be ignorant what the information was, could hardly be understood to speak of the testimony as being that of an expert, although they might of the information. For any refusal of the plaintiff, under this covenant, both to testify and give information, he is only liable in damages; and it is clear that, even if the testimony he should give were prejudicial, the defendants could not recover at all, and that damages for not testifying, or being away when needed, would only be recoverable by way of recoupment against any sum due for giving information, by reason of being in the same instrument, and not by way of diminution of the value of the plaintiff's services; but, in fact, this covenant is also in the alternative, so that the plaintiff escapes liability on it, if he does either of the two, the election being with him. The covenant to pay a per diem allowance for attendance as an expert, cannot make a covenant merely to attend as

a witness illegal, or change it by interpretation into one to give favorable testimony, however proper it might be (if the allowance were very large) as evidence to show, with other circumstances, an extrinsic illegal understanding.

It is not unnatural to assume that no part of an instrument containing many stipulations would have been signed unless the parties understood that all such stipulations could and would be carried out, and therefore, in one sense, every stipulation may be considered to be part of the consideration for every other one in such instrument; but the law does not presume such to be the case, and it depends upon the relation of such stipulations to each other, as established in the instrument, or of the acts for which they undertake, whether they are to be construed as in law mutual considerations; and more particularly are they to be considered independent where one is illegal. The case of *Nicholls v. Stretton*, (*ubi sup.*) goes farther than this, for, where the covenants were plainly considerations for each other, an illegal covenant was avoided and a legal one sustained, although the same consideration applied to both. In this case the tendency to look upon the instrument as one entire contract to make the plaintiff as available as possible as an expert and witness, is still further sustained by the extrinsic evidence that the testimony of the plaintiff was so useful, not to say indispensable, to the making of his information available, but that tendency must yield to the legal interpretation of each part of the instrument, and the duties it imposed and right it gave.

It seems to me that every point that could be legally strained so as to exclude so ungracious a defense as this, should be invoked for the purpose. The plaintiff, at great labor and expense, procured the valuable information, and the defendants agreed to pay \$3,000 for it, if it accomplished a certain end, and after it has done so, they now seek to set up a technical illegality to defeat the plaintiff's action, if the disclosure of such information, being legal, can be brought within any of the rules applicable to work done or goods sold, so as to make the defendants liable for its

Pollak v. Gregory *et al.*

value. I think the covenant in this case ought to be admitted to be the measure of that value, as in other cases.

I have assumed throughout that the consideration of giving testimony favorable to the defendants was illegal, but I do not wish to be understood as meaning to express any opinion on that point. The case of *Yeatman v. Dempsey*, (7 J. Scott R., [N. S.,] 628,) is very strong against it. It would seem very illogical or unjust in that case to have allowed the plaintiff to have recovered substantial damages, unless the absence of the testimony of the defendant was proved to have been positively injurious: the action being on the contract to perform the specified services for the price therein mentioned, and not as any general duty, it would seem to sanction his right to recover for such services in proportion to their benefit to the plaintiff. Assuming that such contracts lead to perjury, I have never been able to appreciate the distinction made in favor of a witness interested in the conviction of an offender criminally, that he is entitled to the reward from motives of public policy; that might lead to depriving him of the reward, because no man should be allowed to disqualify himself from being a witness; but, if such contracts are illegal in a private suit, because it leads to perjury, how much more dangerous to place the life and liberty of an accused man at its mercy. I have also not deemed it necessary to defend the covenant to pay a certain price for information leading to success in a lawsuit from the objection of illegality. *Stanley v. Jones*, (7 Bing. R., 369,) proceeded solely on the ground that the agreement sued on was champertous; that difficulty is removed by the Revised Statutes, (*Sedgwick v. Stanton*, 14 N. Y. R., 289;) any views casually thrown out in that case seem to be overruled in *Yeatman v. Dempsey*, (*ubi sup.*,) where the plaintiff was allowed to recover substantial damages, upon an agreement to attend on a trial and give information collected to qualify the defendant to become a witness. The contract in the case before us

was free from such vice, because it was to pay the price of information already collected, when communicated.

I have already stated that I do not read the covenant of the plaintiff in the instrument in suit as agreeing to give testimony to enable the defendants to succeed, being merely "to hold himself in readiness," which is not to embarrass himself by anything which could prevent him, and to be near at hand in case of need. I also have not been able to find in the covenant to pay the plaintiff his traveling expenses and a daily compensation for his services as a scientific expert, anything said as to testimony or his being a witness, and unless the whole instrument is so redolent of nothing but a design to induce the plaintiff to warp his testimony in the defendants' favor as to taint every part of it, I should be inclined to think the plaintiff could recover upon that covenant, even without being a witness, particularly as the payments are to be made from time to time in the progress of the cause, and he could not be perpetually a witness. I have already stated my views of the whole instrument; they are such as to let the covenant last mentioned stand upon its own merits, which I do not perceive to be affected by any illegal purpose.

The evidence on the trial was sufficient to have gone to the Jury under proper instructions, of the identity of the information communicated by the plaintiff with that recited in the agreement, of the termination of the litigation of the defendants satisfactory to their interests, and of the tendency and agency of such information in bringing about such a result. I think, therefore, the complaint was improperly dismissed, and there ought to be a new trial with costs to abide the event.

Judgment affirmed.

ROBERT and WILLIAM BLAKELY, Plaintiffs and Respondents, v. FREDERICK JACOBSON et al., survivors of Joseph W. Corlies, deceased, Defendants and Appellants.

1. The defendants, *del credere* factors, on being applied to by their principals for advances, rendered an account of sales, showing sales at various dates, and specifying an average date at which the total balance would become due, and gave their acceptances for the amount, payable at that date; but before the acceptances matured they gave their principals notice that they could not pay them. *Held*, that the giving of the acceptances was no bar to an action by the principals against the factors, upon their liability as such, and that in such action the defendants were liable for interest from the day specified, without any further demand.
2. In such an action, an answer by the defendants, alleging that they gave such acceptances for the amount, which the plaintiffs had never surrendered, was struck out upon motion as sham, and judgment entered for the amount claimed, with interest from the date specified as the average maturity of the credits.
Held, on appeal, that as this was the amount which the plaintiffs were entitled to be paid, and was the precise sum which would have been recovered on the acceptances, the judgment was right and must be affirmed.
3. A *del credere* factor, who by the default of purchasers has become liable to pay the price to his principal, is chargeable with interest, without demand. *Per* ROBERTSON, J.

(Before BOSWORTH, Ch. J., HOFFMAN and ROBERTSON, J. J.)

Heard, December 11, 1861; decided, December 28, 1861.

THIS appeal, although nominally from the judgment, was, in fact, from an order striking out the answer of the defendants as sham. The action was commenced on the 14th of August, 1861, by Robert and William Blakely against Frederick Jacobson and Joseph W. Corlies, Junior, survivors of Joseph W. Corlies, deceased; and the following matters are set out in the complaint, viz.:

Prior and up to the 25th of October, 1860, the plaintiffs were partners, under the name of Robert Blakely & Son, and the defendants, and one Joseph W. Corlies, now deceased, were also partners, under the name of Joseph W. Corlies & Co. The former firm consigned to the latter,

Blakely v. Jacobson et al.

at various times before and after the 2d of July, 1860, and prior to such 25th of October, merchandise, set out in a schedule annexed to the complaint, to be sold by them for a *del credere* commission of five per cent to be allowed them. The firm of Corlies & Co., for such commission, agreed with the plaintiffs to sell such merchandise and be responsible to them for the prices thereof, and sold such merchandise at various times in August, September and October, 1860, during the life-time of Joseph W. Corlies, on the credit, at the times and for the prices mentioned in such schedule, leaving a net aggregate sum of \$6,289⁷/₈, due, after deducting such commission; such sum was payable to the plaintiffs on the 12th of May, 1861; that certain credits due to Corlies & Co., and interest, reduce such indebtedness to \$3,430¹/₈, which sum became due on the 12th day of May, 1861, and the defendants promised to pay the same; the plaintiffs demanded but did not receive payment of such amount.

The schedule annexed to the complaint is headed "Sales by Jos. W. Corlies & Co., for account R. Blakely & Son," contains a list of merchandise sold at various dates from July 2d to October 23d, 1861, inclusive, and their prices and the credit on which they were sold; which prices amount to \$6,718⁷/₈: from that are deducted therein certain sums for defective measurement, and other charges, and the commission, leaving a balance of \$6,289⁷/₈, due: opposite to which balance are the words, "Proc. due May 9, 12, 1861." The schedule is signed with the names of the defendants' firm, and dated December 26th, 1860.

The answer admits the partnership of the plaintiffs, but avers them to be residents of the State of Vermont. It admits the consignment to the firm of Joseph W. Corlies & Co. of the merchandise mentioned in the schedule annexed to the complaint, and that such firm agreed to sell such merchandise, and "*to guaranty the payment of the prices of such sales at the maturity thereof*" to the plaintiffs for the consideration mentioned in the complaint. It also admits the sales for the times, prices and credit mentioned

Blakely v. Jacobson et al.

in the schedule annexed thereto. It denies, however, that by the terms of the original contract the proceeds of the sales became due to the plaintiffs on the 12th of May, 1861, but alleges that they became payable on demand, at and after the expiration of the credit given on each sale. It further avers that after such sales, and before the maturity of the credit of any of them, the defendants, at the plaintiffs' instance, and for their benefit, advanced thereon their acceptances for the entire amount for which the firm of Corlies & Co. could be liable. Those acceptances matured on the 12th of May, 1861, and were delivered to the plaintiffs and accepted by them in full extinguishment of the liability of that firm, amounting to the sum of \$3,430⁸⁸/₁₀₀, on account of the before mentioned consignment and guaranty. The answer also admits a demand before suit, but avers that such acceptances were "*not returned or surrendered up*," and never have been.

The motion to strike out such answer was made upon an affidavit of the plaintiff, Robert Blakely, and one William B. Lynes, and was opposed upon an affidavit of Frederick Jacobson, one of the defendants. The plaintiff's affidavit alleges the following facts: "The schedule "annexed to the complaint is a copy of an account made "and rendered by the firm of Corlies & Co. to the plaintiff's firm;" the credit upon all the sales mentioned in the complaint had expired before the beginning of this action; the acceptances mentioned in the answer were not delivered to or accepted by the plaintiffs in full, or any discharge of the liability of the firm of Corlies & Co., or the defendants as survivors, and are ready to be delivered up to them; the plaintiffs wrote about the 24th of December, 1860, to the defendants, requesting payment of what was due to them, or some part thereof, or at any rate some money, and about the 29th of December, 1860, received a reply from the defendants dated on the 27th, in which the latter say: "We have yours of the 24th inst., "and *now inclose your accounts*. We cannot send you "money, for it cannot be got. The best thing we can do

Blakely v. Jacobson *et al.*

"for you is to give you the inclosed acceptances, and "*your bank must do them for you.* In such times they "must help you, for you give them paper in easy times, "when they want it." In such letter the plaintiffs received the inclosed acceptances and said statement of accounts. The plaintiffs procured one of such acceptances to be cashed, but had to pay it before due, because they were informed the defendants could not pay it. The affidavit of Lynes is to the effect that he tendered back the acceptances and demanded payment of the sum due the plaintiffs, which was refused. The affidavit of the defendant Jacobson merely states that the acceptances in question were not given as advances on the consignment in question, but for balances of sales and to close the account. There is no other evidence in the record of any other mode of making any agreement respecting such acceptances than the letters before mentioned, the transmission of such acceptances and the use of one of them by the plaintiffs.

The motion to strike out the answer was granted at a Special Term held by Mr. Justice WOODRUFF on the 8th of October, 1861; and the plaintiffs thereupon entered judgment against the defendants for the sum claimed, with interest, as if upon failure to answer. From this judgment the defendants took the present appeal, stating in their notice of appeal that they would review the order striking out the answer.

William B. Leeds, for defendants, (appellants.)

After reviewing the allegations of the pleadings and affidavits, and insisting on the sufficiency of the answer, at least for the purposes of a trial, argued the following points :

I. The true engagement of a factor *del credere* is merely to pay the debt, if it is not punctually discharged by the buyer; hence it is well established that he is not liable until there has been a default of the buyer. (Story on Agency, p. 254, § 215; *Thompson v. Perkins*, 3 Mason R., 232; *Wolff v. Koppel*, 5 Hill, 458; *Couturier v. Hastie*, 8 Exch., [Wels. G. & G.,] 40.)

Blakely v. Jacobson et al.

II. A factor *del credere* is not liable to an action for goods sold until demand by the principal or instruction to remit. (*Leverick v. Meigs*, 1 Cow., 646; *Walden v. Crafts*, 2 Abb. Pr. R., 301; *Cooley v. Betts*, 24 Wend., 203; *Heubach v. Mollmann*, 2 Duer, 252.

III. In *Heubach v. Mollmann*, (2 Duer, 259,) the learned Court says: "We exceedingly doubt whether a *del credere* agent may, in his discretion, charge himself immediately with the price of goods sold upon credit." In this case the agent averaged the maturity of the sales and discounted the average at 6 per cent per annum, and immediately remitted to his principals net proceeds by bill, which bill was subsequently dishonored.

The judgment should be set aside and the order of the Special Term reversed.

Augustus F. Smith, for plaintiffs, (respondents.)

I. The design of the answer seems to be to make two defenses: 1. That the acceptances extinguished the original obligation, and that an action can be maintained only upon them.

The answer to this is: A. That by the law, as established in this State, the promise of one or all of several debtors is no consideration for a promise (if made out) to discharge one or all of the debtors; the original debt remains. (*Cole v. Sackett*, 1 Hill, 516; *Hill v. Beebe*, 3 Kern., 562.) B. The affidavit of the plaintiff shows how the acceptances were given, and that it was at the instance of the defendant, and that no promise whatever was made.

2. That the acceptances were not delivered up at the time of the demand.

To this the answer is:

A. That it was sufficient to produce and cancel the acceptances at the trial, as was done here upon the motion. (*Nellis v. Bradley*, 1 Sandf. S. C. R., 560; *Thurston v. Blanchard*, 22 Pick., 18; *Nichols v. Michael*, 23 N. Y. R., 264.)

Blakely v. Jacobson et al.

B. The answer does not aver that the acceptances were not tendered. In fact they were.

BOSWORTH, Ch. J. The contract between the parties, as stated in the complaint, was, that Joseph W. Corlies & Co. "undertook and agreed with the plaintiffs to sell said goods, and to be responsible for the prices of the said goods."

The answer states that said firm "agreed to sell said goods, and to guaranty the payment of the prices of said sales, at the maturity thereof, to the plaintiffs." It is undisputed that the sales, by average, matured May 9th, 12th, 1861, and that the balance due plaintiffs is the precise principal sum for which judgment is entered. The judgment is for said principal sum of \$3,430¹/₂, and interest thereon from said May 12th.

The present defendants rendered an account, as early as December 27th, 1860, in which they made themselves debtors as of May 12th, 1861, and sent their acceptances to the plaintiffs for the correct balance maturing that day. By that operation they secured the use of the amount of all sales maturing before May 12th, up to that date.

The giving of the acceptances shows a clear purpose in the defendants to make themselves liable, unconditionally, and for interest subsequent to May 12th if payment was not made on that day, as well as for the principal itself. And this is but mere equity, they having had the proceeds of the sales to their own use.

Before the acceptances matured they notified the plaintiffs of their inability to pay them.

The defendants having in writing agreed, by their acceptances, to pay on the 12th of May the precise principal sum for which judgment is taken, and thus having obtained till that time the use of the amount of all sales maturing prior to that day, and before that day arrived having notified the plaintiffs that they could not pay, any subsequent or other demand became unnecessary, and they ought, in equity and good conscience, to pay interest from May 12th.

Blakely v. Jacobson et al.

A suit on the acceptances would necessarily have resulted in a judgment for the precise amount of the one entered. And the giving and taking of the acceptances is no bar to an action on the original cause of action. Joseph W. Corlies having died October 26th, 1860, before the acceptances were given, the persons liable as such acceptors, and on the original contract, (as contracting parties,) are the same.

If, as stated in the appellants' points, "the legal effect of the acceptances was to certify to the plaintiffs, that on the 12th of May, 1861, the acceptors would have on hand funds of the plaintiffs to the amount of the acceptances, which they would pay to the owners and holders of the acceptances," then, inasmuch as before the 12th of May, 1861, they notified the plaintiffs they could not pay, or, in other words, would not pay; the plaintiffs, as holders of the acceptances and consignors of the goods, have a strict right to be paid the amount of the acceptances, and interest thereon from their maturity. For that sum the judgment is given. The answer presented no question of substance to be tried, in respect to which the parties do not agree.

The judgment should be affirmed.

HOFFMAN, J., concurred in this opinion.

ROBERTSON, J. The only prejudice to the defendants arising from the striking out of the answer, and thus depriving them of any defense to any part of the claim of the plaintiffs which it sets up, of which they complain, relates to interest, being for the time between the average date of the sales of merchandise by the defendants and the demand of payment. The interest actually allowed is, of course, the same, whether calculated on the whole amount from such average date, or on the proceeds of each sale from the time the credits on them respectively expired. Interest is always payable on a contract to pay a specified sum of money on a fixed day, or on a special contract. (*Van Rensselaer v. Jewett*, 2 Comst., 135; *Williams v. Sherman*, 7 Wend., 109; *Fester v. Heath*, 11 Id., 477; *Still v. Hall*, 20

Id., 51.) If, therefore, the contract of the defendants with the plaintiffs, in consideration of the commission, was that the latter should be paid, either by the purchaser or himself, the proceeds of each sale, on the day the credit given thereon expired, without any demand by the plaintiffs from either, or any other step to be taken to make the defendants liable, they were chargeable with interest, from the expiration of such credit. What the liability of the defendants was, depends upon the effect given by law to the payment of what is termed a *del credere* commission; whether it raises a mere guaranty of the solvency of purchasers from the factor on sales by him of the merchandise of the principal, requiring some steps by the latter, to ascertain the readiness of the purchaser to pay, by action, or at least demand, and some notice to the factor that such purchaser has not paid, and he is looked to by means of a demand, or whether it is an absolute undertaking by the factor that the purchaser will pay, on the expiration of the credit, and that if he does not, he, the factor will, without any demand or notice.

The Italian words used to express the nature of such a contract have been employed in almost every legal decision upon the subject, and certainly in every elementary work, are tacitly admitted thereby to embody its essence. Their proper original meaning ought, therefore, to throw some light upon its nature. Mr. Bell, in his Commentaries, states it to mean a liability like that upon a loan of money by the principal to the factor. This meaning is substantially adopted in all elementary works, (5 Com. Dig., [E.] 55; 1 Com. on Cont., 253; 2 Kent Com., 487, [1st ed.]; Paley on Agency, 41; 3 Ohit. Com. L., 194, 220, 221; 1 Livermore, 409;) and in all decisions in England down to that of *Morris v. Cleasby*, (4 Maule & Sel., 566, 574, 575.) In *Grove v. Dubois*, (1 D. & E., 115,) Lord MANSFIELD stated it to be an absolute engagement to the principal from the broker; that it made him liable in the first instance, and that there was no occasion for the principal to communicate with the parties contracting with the

Blakely v. Jacobson et al.

broker in the first place, though he might resort to them as collateral security; and Justice BULLER remarked that he had never heard the inquiry made if there had been a demand. Justice COWEN, in *Wolff v. Koppel*, (5 Hill, 459,) understood Lord MANSFIELD, in such case, as considering the factor to be the principal debtor and the purchasers as mere accessorial. Lord ELLENBOROUGH, in *Wienholt v. Roberts*, (2 Camp., 587,) considered the *del credere* broker as the owner of the policy. CHAMBER, J., held the same doctrine in *Houghton v. Matthews*, (3 Bos. & Pul., 489.) Chitty, in his *Commercial Law*, (194, 220, 3d vol.,) states that the factor may be sued for goods sold as purchaser, and such seems to be the view of PARKER, J., in *Swan v. Nesmith*, (7 Pick., 220.) In this State, in the case of *Leverick v. Meigs*, (1 Cow., 663,) Justice WOODWORTH substantially recognizes the same doctrine when he declares the factor to be bound to pay the price at all events, although he seems to have been perplexed to reconcile it with that laid down in *Morris v. Cleasby*, (*ubi sup.*,) and some subsequent English cases. In the case of *Wolff v. Koppel*, (5 Hill, 459; *S. C.*, 2 Den., 371,) where the question seems to have fairly arisen in this State, out of the effect of the statute of frauds on such a contract, it has been set at rest. The proposition is fairly met, both in the prevailing and dissenting opinions in that case, in the Court of Errors; that if the contract of the factor was merely as surety for the payment by another of his debt, it must be in writing; and it was held that it need not be so, because it was an original undertaking. Justice COWEN, in his opinion in the Supreme Court, in the same case, states that "in substance the factor prefers, instead of paying cash, to contract a debt, or duty, which obliges him to see the money paid; the debt or duty is his own for an adequate consideration, contingent on failing to secure it from another." Senator PORTER, in the prevailing opinion of the Court of Appeals, declares "the understanding of the commercial community to be universal that the agreement between the principal and factor is original and

Blakely v. Jacobson et al

"absolute, to pay the price of the sales, deducting commissions, at the time the credit expired; a contrary rule would require the principal to exhaust his remedy against the purchaser, to determine his insolvency, before he could charge the security." The strong vote in the Court of Errors for affirmance of the judgment in the Court below, shows the universality of the belief in such understanding, the Senator delivering the dissenting opinion having only secured one additional dissident. In that case, the case of *Morris v. Cleasby*, (*ubi sup.*) and subsequent English cases of *Hornby v. Lacy*, (6 Maule & Sel., 166,) *Peelo v. Northcote*, (1 B. Moore, 178; S. C., 7 Taunt., 478,) and *Gall v. Comber*, (1 B. Moore, 279,) are commented on, and, so far as they are antagonistical to the conclusions arrived at, are rejected as authority. The principle may, therefore, be considered as settled in this State at least.

The case of *Halden v. Crafts*, (4 E. D. Smith, 490,) in a Court of coördinate jurisdiction, decided by Justice WOODRUFF, now a member of this Court, has been cited as adverse to the conclusions already arrived at, but I think, on examination, the conflict will be found only apparent. It will be found that in that case, although the defendant was to receive a *del credere* commission, and it was material to determine whether his liability accrued without a demand, no step was had on the part of the commission, and the whole case turned upon the defendant's liability as a foreign factor, and not as principal in an undertaking. The reporter in that case evidently so understood it, for no mention is made in the head-note of the existence of the *del credere* contract. The learned Judge, in his opinion, cites the cases of *Ferris v. Paris*, (10 J. R., 285,) *Cooley v. Betts*, (24 Wend., 203,) *Lillis v. Hoyt*, (5 Hill, 395,) *Hays v. Stone*, (7 Hill, 128,) *Baird v. Walker*, (12 Barb., 300,) as authorities for the principle laid down by him, in none of which was the commission *del credere*. He also takes notice of the case of *Leverick v. Meigs*, (1 Cow., 646,) not cited by either counsel in the

Blakely v. Jacobson *et al.*

case before him, and quotes the words of it, that the *del credere* factor, "is held to an *unqualified undertaking* that "the purchaser of the goods shall pay for the goods according to the terms of sale," the sole question in that case being whether the factor was responsible for bills remitted by him as proceeds of negotiable paper taken by him on the sales. The case of *Heubach v. Mollmann*, (2 Duer, 252,) was also referred to as showing a factor's duty in reference to proceeds received by him. No allusion is made to the fact that a *del credere* factor becomes a principal in case the purchasers do not pay, nor is it contended that by any fiction of law the money due from him as a debtor is to be considered as if it were actually paid by the purchasers into his hands. Besides this, the case of *Wolff v. Koppel*, although decided by the highest Court in the State, was not cited or referred to by either the counsel or the Court, either to impugn its authority or disprove its applicability to the case in hand; that case clearly makes the liability of the factor an undertaking to pay, absolutely, in case the purchaser did not, and not merely a promise to remit, according to instructions, or pay on demand. Unless the liability of the defendant in *Halden v. Crafts* was, therefore, solely as factor, *Wolff v. Koppel* would have been conclusive authority in his favor. It will be found, however, that it does not appear, by the statement of facts in the former case, whether the defendant had or had not been paid by the purchasers, such omission being a condition precedent to his personal responsibility, the onus of proving which probably lay on the plaintiff, if he sought to recover without a demand. It may have been conceded that the defendant had received such proceeds, or the question may not have been raised as to the different form of his liability in case he had not; the question was discussed as though the liability was as factor having funds in his hands, not as an original promisor for not having received them. I apprehend, therefore, that unless the case of *Halden v. Crafts* is to be considered as intended to overrule *Wolff*

Blakely v. Jacobson et al.

v. Koppel, it is no authority against any of the propositions hereinbefore laid down.

The responsibility of ordinary factors for funds received by them may be limited to a liability only after demand or instructions to remit; this, however, will not affect the liability of one who undertakes to pay a debt if another does not. A *del credere* factor may, as agent, receive the money from the purchasers, and such receipt as agent will discharge his own liability on paying the amount himself. But in an action by him, against purchasers for the price of the goods, he could collect interest on such amount when due, which ought to belong to his principal; his contract for the commission allowed him is to see that his principal receives the price due him, without diminution; in fact, to indemnify him against loss by the sales; and if so, there is no reason why the factor should not pay that interest, for which the purchaser is liable, to the same extent and in the same manner as the latter, which is without any demand.

Upon these principles, if the answer alleges as a fact the contract to have been to pay on demand, the defendants were liable, upon the state of facts appearing in the pleadings and affidavits, to pay interest upon the amount of the sales made by them, from the time when the credit on them expired. The complaint does not, in fact, state the time when the defendants undertook to pay the proceeds of the sales; although it alleges that they became due to the plaintiffs at the specified date which is the average of the credits, and that the defendants owed them at that time. Of course the liability of the defendants was solely founded upon their agreement, which may have been either in terms special, or subject to a custom as to the time of payment, and the latter allegations may be considered as only conclusions of law. Even the answer itself is somewhat ambiguous as to the terms of the contract, which it does not set out, although it alleges that by them the proceeds of the sales did not become due at the average date, but on demand, after the expiration of their credit, which

Blakely v. Jacobson et al.

also becomes rather an allegation of their legal interpretation than their language.

Enough, however, appears on this record to authorize this Court to consider the complaint as amended, if necessary, so as to conform to the allegations of the answer, if true, or the proof by affidavits, if not, even without any notice of motion to amend, (*Bate v. Graham*, 1 Kern., 237; *Clerk v. Dales*, 20 Barb., 42,) as the appeal is from the judgment; and the fact that it is by default cannot make any difference. But, in fact, the variance between the contract set out in the complaint and that appearing by the evidence, is one that might be disregarded, as it could not prejudice the defendants, (Code, § 169,) and there is no proof that they were misled. (*Catlin v. Gunter*, 1 Kern., 368.) The variances overlooked in *Carter v. Heye*, in the Supreme Court, (10 Barb., 180,) *Trowbridge v. Didier*, (4 Duer, 448,) *Newstadt v. Adams*, (5 Duer, 43,) *Hart v. Hudson*, (6 Duer, 294,) *Purchase v. Mattison*, (6 Id., 587,) and *Rogers v. Verona*, (1 Bosw., 417,) in this Court, and *McCumber v. Granite Ins. Co.*, (15 N. Y. R., 495,) in the Court of Appeals, were all greater than that in this case. Mistakes of persons, periods and places, and the substitution of a joint for a several, and a conditional for an absolute contract, or an excuse for the omission of an act instead of the act itself, and *vice versa*, were held immaterial in those cases. A variance in the mere absolute time of payment of money, where no demand is necessary, may be considered so immaterial as to have entitled the Court to have directed the fact to be found according to the proof. (Code, § 170.) The same test is, of course, to be applied to a sham answer, where the only question is whether there is anything to be tried if the case should be allowed to go to a Jury. (*The People v. McCumber*, 15 How., 186.)

It is a serious question in this case, however, whether the order complained of, could be reviewed on this appeal not made directly from it; that is, whether it involves the merits, as well as affects the judgment. (Code, § 329.) In *Whitney v. Waterman*, (4 How., 313,) and *Otis v. Ross*,

Blakely v. Jacobson et al.

(8 Id., 195,) it was conceded that if the parts of an answer stricken out by an order, did not affect the defendant's rights, no appeal lay from it directly. If the variance between the contract set out in the complaint and that established was not material, and the plaintiffs had a right to the same judgment for the same sum in both cases, to allow the answer to stand, merely to try the question of the precise form of the contract, would be a mockery of justice. But the evidence, assuming the allegations of both the complaint and answer, as to the form of the contract, to be as claimed by the defendants, establishes one not essentially varying from that set out in the complaint. It does not clearly appear by the evidence that the account annexed to that pleading was that one which was rendered when the acceptances were sent, although it does appear that it came from the defendant; in that it is admitted that the proceeds of the sales therein set out were payable on the 9th to the 12th of March, and there is no attempt to explain away such admission. If that account were the one so inclosed, it does not appear by the letter sent that it was only admitted upon condition, as claimed by the defendants, that the plaintiffs took the accompanying acceptances in payment. The plaintiffs' letter asked for money before it was due, and of course, as a favor; the reply to it first speaks of inclosing the accounts, probably to show that no money was due, and then offers the acceptances as the best thing they could do, adding that the plaintiffs' bank must discount them for them, thereby treating them rather as a means of assisting the plaintiffs to get what they desired, than as a mode of discharging their own obligation. The burden of the proof of establishing clearly the acceptance of a negotiable instrument in such case, as payment, lay with the defendants, (*Noel v. Murray*, 3 Kern., 168,) and they did not succeed in that. The adoption of the accounts and the receipt of the acceptances in payment, if intended to be, were not so inseparably connected by such reply as to make the rejection or acceptance of either dependent on the other, and there is

Kane v. Johnston.

no other evidence of the terms of giving such acceptances.

Moreover, the defendants were liable upon such acceptances in any event; the representatives of their deceased partner were alone interested in determining whether they were accepted in payment of any prior undertaking. No judgment in this case could affect or avail such representatives in any way, unless by way of election by the plaintiffs. I do not see why, as regarded the defendants, the plaintiffs could not proceed upon the original contract, surrendering the acceptances to be canceled on the trial. (*Nellis v. Bradley*, 1 Sandf. S. O. R., 560; *Thurston v. Blanchard*, 22 Pick., 18; *Nichols v. Michael*, 23 N. Y., 264.)

The judgment, therefore, must be affirmed with costs.

MARY KANE, Plaintiff, v. JOHN T. JOHNSTON, Defendant.

1. In computing the damages to be awarded to the plaintiff for an injury to his tenement and business by the defendant, a loss of anticipated profits arising from an illegal business cannot be included.
2. If it appears that the plaintiff was selling liquors, the burden is upon him to show that he had a license, if he would recover for such loss of profits in that business.
3. Where the plaintiff was a tenant having an unexpired term of only one month, and it appeared that she had no license; *Held*, that there was no presumption that she would have obtained a license before the expiration of the term.
4. In such case it is error for the Judge to refuse the defendant's request to charge the Jury that the plaintiff is not entitled to recover for loss of profits from sale of liquor.

(Before BOSWORTH, Ch. J., MONCRIEF, WHITE and BARBOUR, J. J.)

Heard, January 18, 1862; decided, March 15, 1862.

THE exceptions taken at the trial of this cause, and the defendant's motion for a new trial, were directed to be heard, in the first instance, at General Term.

The action was brought by the plaintiff, a widow, who occupied a building in Pearl street, in the City of New

Kane v. Johnston.

York, as a boarding house and grocery, to recover damages sustained by her by the fall of a warehouse near by, which it was alleged was owned and built by the defendant, and the fall of which was alleged to have been caused by negligence in its construction and use.

The cause was tried on the 4th of November, 1861, before Mr. Justice ROBERTSON and a Jury; and the plaintiff recovered a verdict for \$75. The material parts of the charge, and the exceptions, appear in the opinion of the Court.

Hamilton Odell, for the defendant, insisted that a motion for a nonsuit, which had been made at the trial, should have been granted, and that there was no evidence to sustain the verdict; and also reviewed the charge, and refusals of requests to charge, and argued that for error in these the verdict should be set aside.

Solomon B. Noble, for plaintiff.

I. The defendant cannot review, under the 265th section of the Code, pure questions of fact.

If the evidence is sought to be reviewed, and the finding of facts considered, either with or without the questions of law, a case and motion for a new trial at Special Term are the proper proceedings. (*Morgan v. Bruce*, 1 Code R., [N. S.,] 365; *Ogden v. Coddington*, 2 E. D. Smith, 317; *Gilbert v. Beach*, 16 N. Y. R., 606; *Cobb v. Cornish*, 16 N. Y. R., 602; *Thurber v. Townsend*, 22 N. Y. R., 517; *Morange v. Morris*, 12 Abb. Pr. R., 164.)

II. The Court was right in denying the motion to dismiss the complaint.

III. The exceptions taken to the charge of the Judge cannot be sustained.

BOSWORTH, Ch. J. The Judge, in his charge upon the question of damages, speaking of the plaintiff's business which had been interrupted or broken up, used this language, viz.: "It appears she was in the habit of keeping boarders, selling liquors, groceries and vegetables, which

Kane v. Johnston.

were left in a condition to be destroyed; the liquor she sold there, by which she made money, it is said, she sold against the law, and that you cannot take into calculation an illegal traffic; upon that point the defendant is bound to make out that she was selling liquor without a license, in order to deprive her; whether she was or not, it is for you to say from the testimony."

The defendant asked the Judge to charge, that the plaintiff is not entitled to recover for loss of profits from sale of liquor. The Judge declined and the defendant excepted.

The only evidence in respect to her having a license is her own testimony in these words, viz: "I had a license to sell liquor; that is, my husband had." The plaintiff was a widow.

If the rule be, as the Judge seems to have stated it, that if the plaintiff was selling liquor without a license, she could not recover for a loss of profits in that business, then it follows that the defendant was entitled to the instruction which he asked the Judge to give. It appeared by her own testimony that she had no license.

But the burden of proof is on the plaintiff, to show that she had a license. (*Ehel v. Smith*, 3 Caines R., 187; *Griffith v. Wells*, 3 Denio, 226.)

Failing to show that, the presumption is, that her traffic in liquors was illegal, and for the loss of profits caused by interrupting a business of that character, she could not recover.

The actual value of the leasehold interest, if entirely destroyed, or the amount of the loss, if the injury was partial, should have been allowed: But it is one thing to allow the value of premises, whether that value consists, in part, of the advantages of its location, or of its adaptation to a particular branch of business, and quite another to allow for a loss of anticipated profits resulting from the interruption of a business in itself illegal.

The Judge charged that she was only entitled to be compensated for injury to her business "for the time she

Kane v. Johnston.

was actually entitled to remain in the house, and it appears that her contract or legal right was for a month."

There can be no presumption that she would have obtained a license for a month, or for a year, and have paid the necessary license fee, in order to carry on, legally, for a month, a business which theretofore had been conducted contrary to law. And for the profits lost, between the time of the injury and some day when it may be conjectured she could and would have procured a license, it is quite clear there can be no recovery.

Even if it can be assumed or found that the premises had something of value attached to them, which may be called good will, it may be conceded that she may be allowed the value of her premises, including as a part of it the worth of this good will; and yet it does not follow that she may recover for the loss of profits which she might have made from transacting an illegal business.

An "exception is taken to the refusal of the Judge to charge, that the plaintiff is not entitled to recover for loss of profits from sale of liquor."

The defendant was entitled to this instruction, as it appeared from the testimony of the plaintiff herself, that she was selling without a license. She could not have recovered the value of anything sold in the course of this business, from those who dealt with her, nor can she recover from a third person for a loss of profits anticipated from it, caused by the negligence of such third person.

The recovery is for so small a sum that I should be disposed to refuse a new trial, were it not, that in my view of the law, the verdict cannot be sustained, by reason of the refusal of the Judge to charge as requested.

The other Justices who heard the argument concurring, except BARBOUR, J., who dissented, the verdict was set aside, and a new trial ordered, with costs to abide the event.

STEPHEN C. CLARKE, Receiver, &c., of the New York Gas Regulator Company, Plaintiff and Respondent, v. ANN ACOSTA and JAMES V. GRAHAM, Executrix and Executor, &c., of John Acosta, deceased, Defendants and Appellants.

1. Where the receiver of a dissolved corporation brought an action against the executors of the deceased president and treasurer, to recover from his estate the amount of moneys of the corporation which he had loaned to stockholders, without authority and contrary to the statute, the defense interposed was that the trustees of the corporation had ratified the act. The Referee before whom the cause was tried reported substantially the facts alleged in the complaint, and, as a conclusion of law, found that the plaintiff was entitled to recover, but did not expressly negative the alleged ratification. The only evidence of any ratification was that in an annual report of the company, a part of the sum was mentioned as loaned to certain stockholders.

Held, that the judgment for the plaintiff was correct.

2. A finding of the Referee contained in the case, as settled, that the deceased, after making the loan, informed the trustees and stockholders that he had made it, there being no other evidence of his giving such information than the annual report above mentioned, does not conflict with the presumption arising from his reporting in favor of plaintiff, that he found against the defendants on the question of ratification.

(Before BOSWORTH, Ch. J., MONCRIEF and ROBERTSON, J. J.)

Heard, February 8, 1862; decided, March 15, 1862.

THIS was an appeal from a judgment in favor of the plaintiff, entered on the 11th of December, 1861, upon the report of Henry Nicoll, Esq., Referee, to whom the cause was referred for trial.

The action was brought by the plaintiff, as Receiver of the New York Gas Regulator Company, a corporation of this State, he having been appointed, upon its dissolution, by the Supreme Court. The complaint alleged, in substance, that on the 18th of April, 1856, the copartnership of Foster & Nickerson, being stockholders in that corporation, and the defendants' testator, John Acosta, being trustee, president and treasurer of the corporation,

the latter loaned \$2,000 of the corporate funds to the former, knowing them to be stockholders, and that the loan had never been repaid; and sought judgment for the amount, with interest, against defendants, as his personal representatives.

The answer, besides denying certain allegations, alleged that the delivery of said money by said Acosta to Foster and Nickerson was ratified by the officers of the company to which said money belonged.

The report of the Referee found the above facts to be as alleged by the plaintiff, and directed judgment for him, from which judgment defendants appealed.

A. W. Clason, for defendants, (appellants.)

The act of Acosta in lending the money was not improper, for it was on interest reserved to the corporation; it was not illegal, for the statute does not prohibit such loans, but its effect is merely to declare that if made, the officers assenting shall be liable to the corporation creditors. The allegations of fraud in the complaint are not supported; and the loan was sanctioned by the other trustees.

Henry A. Cram, for plaintiff, (respondent.)

I. Acosta, the treasurer, in making the loan in question, acted without authority.

II. The loan was, therefore, illegal, a breach of trust and official duty, and an illegal conversion.

III. If Acosta had been simply a trustee under a private trust, he would have been personally liable for lending their money without taking any security. The same rule should apply to a trustee for stockholders.

IV. The loan was unauthorized and illegal, because Foster & Nickerson were stockholders, and therefore the loan was prohibited by § 14 of the general manufacturing companies law, under which the company was organized. (2 R. S., 5th ed., p. 661, § 37; *Griffith v. Wells*, 3 Denio, 226; *Livingston v. Van Ingen*, 9 Johns., 507; *Wheaton v. Hubbard*, 20 Id., 290; *Scidmore v. Smith*, 13 Id., 322.)

Clarke v. Acosta et al.

V. It is no answer to this last point, that the only consequence of the illegal act is that provided for by the statute, viz., liability to creditors of the company.

The injury to the company for an unauthorized conversion of its money is one for which the common law gives a remedy, and this remedy is not taken away by the provision giving a recovery for a penalty to creditors. (*Livingston v. Van Ingen*, 9 Johns., 507; *Scidmore v. Smith*, 13 Id., 322; *Wheaton v. Hibbard*, 20 Id., 290.)

VI. As a matter of law, the trustees could not ratify the illegal act of the treasurer. The board had not the power to do the act, and, of course, they could not ratify it.

VII. As a matter of fact there was no ratification. To make out a ratification, as a matter of fact, there must be clear evidence of knowledge of the exact act and its illegal character, and a deliberative affirmative act of ratification.

The silence, upon full knowledge, that would bind the company as to strangers, will not be held a ratification as between the company and its treasurer, of an illegal act of the latter, which the company itself had not the power to do.

BOSWORTH, Ch. J. The company, of which the plaintiff is Receiver, was forbidden by statute to loan any of its money to any stockholder of the company. (2 R. S., 5th ed., 661, § 37, [sec. 14].) The loan in question was not made by the company or in its name, but was made by John Acosta, then being trustee, president and treasurer. In making the loan, he did an act which the company was forbidden to do, and one which makes every officer of the company, "who shall assent thereto," liable to the extent of such loan, for all the debts of the company, contracted before the repayment of the sum so loaned. (2 R. S., *supra*.)

To exonerate John Acosta from liability to the company, for this unauthorized use of its moneys, it should at least be established, that the officers of the company authorized to bind it by acts done in its name, had, in behalf of the company, ratified the act.

 Clarke v. Acosta et al.

The Referee has not found, as a fact, that it was ratified by the company. The Referee's report, dated December 3d, 1861, contains no statement or finding in regard to this defense. The case, in its statement of the facts found by the Referee, specifies that "Acosta afterwards informed the trustees and stockholders that he had loaned said money to Foster & Nickerson." When he so informed them, or whether, at the time the information was given, the trustees were together in that capacity, or what either of them said when so informed, or whether either of them then, or at any time, said anything on the subject, is not found or stated as a fact.*

The loan was made on the 18th of April, 1856. The minutes of the proceedings of the trustees, at the meetings held by them as such, during the year 1856, make no mention of any such loan. This was admitted at the trial. There was no attempt to prove that the minutes of the proceedings of any subsequent meeting of the trustees, mention it.

The only evidence in the case, that Acosta informed the trustees he had made this loan, consists of a statement, in the annual report of the company for the year ending January 31, 1857, in these words, viz.:

"Cash in bank 1st Feb'y, 1857, ..	\$1,302 41	
do drawn " " "	22 18	\$1,334 59
do in hands of Foster & Nickerson, entered to present date, including, also, the additional loan of \$1,500,		3,289 37"

The witness, Foster, says the loan of \$2,000 is mentioned in this report. The above extract contains the only mention made of it. The report spoke of "do," or cash "*in hands*" of Foster & Nickerson, and by those words, no more declares that the money they held had been loaned to them, than it declares the money "*in bank*" had been loaned to it. The only words intimating the fact of a loan are, "including, also, the *additional* loan of \$1,500." It

Clarke v. Acosta et al.

is found as a fact, that no part of the loan of \$2,000, was repaid, and there is no evidence that any part of the loan of \$1,500 was repaid. Taking \$1,500 from \$3,289.37, leaves \$1,789.37, which is less than the principal of the loan of \$2,000.

It does not appear by the case, that the defendants requested or required the Referee to make a formal finding, upon the allegation in the answer, that the loan was ratified. The only exceptions to the decision are, *first*, to the conclusion of law that the loan was illegal, and *second*, to the general conclusion that the plaintiff is entitled to recover.

Even if it be admitted that a ratification by the company, of Acosta's act in loaning the \$2,000, would exonerate him from liability to the company, and leave him under no liability by reason of it, except for debts of the company, still it is essential to his defense, that a ratification should be found or proved.

It has not been found as a fact, that it was ratified, and there is nothing in the Referee's report in conflict with the presumption, arising from his reporting in favor of the plaintiff, that he found that fact against the defendants. (*Grant v. Morse*, 22 N. Y. B., 323; *In Re The Duke of Beaufort*, 8 Com. Bench, N. S., 146.)

A finding that "Acosta afterwards informed the trustees and stockholders that he had loaned said money to Foster & Nickerson," without finding more, should not be held to establish, as matter of law, that they ratified an act which the statute prohibits the company from doing, or to establish as a matter of fact, a ratification of this misconduct.

I think the judgment is correct on the facts found, and that the case does not show that the Referee has committed any error, on the trial or in his decision, and that the judgment should be affirmed.

MONCRIEF, J., concurred in this opinion.

ROBERTSON, J. Disembarrassed of all questions of statutory liability, this seems to me a plain case of the misap-

Secor et al. v. Law.

propriation of the funds of a company by the treasurer of the company, in which he was knowingly assisted by a director, who reaped the benefit of it. The authority of the defendant's testator was confined to the care and custody of the money of the company. Under pretense of a loan, that is, a promise to repay it, he delivered this money to Foster & Nickerson, who knew the extent of his authority; and subsequently confessed, in a written statement to the officers, that he had placed it in the hands of that firm. Nothing was ever done by the officers, on such confession. If such an admission, without any subsequent act, could constitute a ratification, any confession of embezzlement, on which no steps were taken, would equally condone the offense. The Referee has not found the ratification set up in the answer, and therefore, if there be any room for doubt that it was proved, he must be held to have found that it was not. (*Grant v. Morse*, 22 N. Y. R., 323.)

I am not prepared to say that this came within the statute (2 R. S., 661, § 37, 5th ed.,) as a loan, or that the plaintiff, as Receiver, can recover the money, when the statute only gives it to creditors while the loan is running; if he could, I do not see how a ratification by other officers would help the original delinquent. But for the reasons I have given I think the judgment should be affirmed with costs.

Judgment affirmed.

**THEODOSIUS F. SECOR, and CHARLES MORGAN, Plaintiffs
and Respondents, v. GEORGE LAW, Defendant and
Appellant.**

1. The defendant and others who were associated in an enterprise of building certain steamships to fulfil a contract with the United States government for carrying the mail, entered into an agreement with each other whereby the defendant and R., C. and W., agreed to build such steam vessels, to conform to such government contract, under the direction and control of the defendant; such vessels when built to be held by the defendant, and R. and M., as trustees for the other associates. The hulls of two of such ves-

Secor et al. v. Law.

sels having been built, the defendant made a contract with the plaintiffs' firm for the steam engines, at a cost of \$300,000. This contract, which was tripartite, purported, in the body of it, to be made by the defendant and R. C. and W., with another person, who was not a party to the original agreement of the associates; but it was not signed by any one but the defendant. In making it and carrying it out, the plaintiffs' firm dealt only with the defendant. He made sundry payments upon the contract, partly by conveying land in which his associates had no interest, and partly by giving his individual notes, payable at a future day, without adding interest for the time, which he refused to include on account of alleged delay in the work, and of a claim to damages for which delay, he had given them written notice in his own name. Upon accounting with his associates, he charged them with the price of the land as a cash payment, and interest upon the notes he had given, from the day of giving them, and after adjusting his accounts with plaintiff's firm, promised them to pay the balance.

Held, that in an action for the balance due for the work under the contract, and extra work on the same vessels, such facts were evidence from which a Referee might infer that exclusive credit was given to the defendant, and if so, that an action would lie against him alone, without joining the other persons named with him in the instrument.

Held, further, that even if this were not the case, he made himself liable on the contract by signing it alone; there being no proof that he intended not to be bound until the others signed.

Held, further, that the evidence in the case being sufficient to sustain the finding by the Referee, that the defendant, having, on an accounting with his associates, been allowed the sum due the plaintiffs' firm, in consideration thereof assumed payment of the same to them, such finding would sustain the plaintiffs' action against him alone.

Held, further, that, upon the evidence, the Referee being warranted in finding that the defendant, upon an accounting with the plaintiffs' firm, in relation to the contract with them and the work under it, had either waived all claim for damages on account of delay in the work, or had considered the advantages he obtained in the settlement equivalent to it; he might disregard such claim as being no longer available to reduce plaintiffs' claim.

2. It appearing on the trial of the cause, that at the execution of the contract sued on, the plaintiffs gave the defendant a receipt for \$30,000, as paid thereon, but that such sum had not been charged by the defendant in his accounts with his associates by which he settled with them:

Held, that evidence that the money had not actually been paid was admissible.

Held, further, that evidence of the failure of the defendant to communicate to his associates the fact that he had obtained credit by giving his notes without interest, or had conveyed land instead of paying money, at the time of settling his accounts with them, was admissible as a circumstance to show that the defendant deemed the contract entirely his own.

3. *It seems* that the defendant had not, merely as a joint owner of the hulls of the vessels, authority to bind his co-owners, by a contract for the conversion of them into steam vessels, by placing engines in them.

Secor *et al.* v. Law.

4. *It seems* that the objection of non-joinder of the other parties is waived, by setting up a counterclaim in favor of the defendant jointly with the same parties, against the plaintiffs.
5. *It seems* that a claim for unliquidated damages against the plaintiffs and others, in favor of the defendants and others, is not available by way of recoupment, counterclaim, or set-off.
6. Where a complaint, as originally framed, set up three separate causes of action, but after the proofs were closed upon the trial, and the cause submitted, the Referee permitted an amendment thereto by adding a statement of a fourth cause of action, (demanding the same sums as were demanded in the original complaint,) in which it was alleged that the defendant having claimed damages for delay in the work, the parties, on an accounting of all these claims, including such last mentioned claim, found a specified balance due, which defendant promised to pay;

Held, 1. That the defendant, by amending his answer, and taking issue on such new cause of action, waived all objections to the propriety of permitting the amendment.

2. That the amendment was within the discretion of the Referee, and properly permitted.

(Before BOSWORTH, Ch. J., MONCRIEF and ROBERTSON, J. J.)

. Heard February 10, 1862; decided March 15, 1862.

THIS was an action to recover for work done and materials furnished by the plaintiffs, at the defendant's request, consisting principally of two low pressure steam engines, constructed and placed on board of two vessels, known as the Ohio and Georgia, at a certain contract price, and also for certain additional work done and materials furnished on board of such vessels, in putting up some coal bunkers with their appurtenances.

In April, 1847, a Mr. Sloo made a contract in writing with the Secretary of the Navy of the United States to establish a line of steamships to transport the United States mail between New York and New Orleans, pursuant to an act of Congress, passed in March previous, authorizing such a contract. The burthen of the vessels and the power of their engines were described in such contract; they were therein required to be constructed under the direction of a constructor employed by the Navy Department, and to be capable of being converted into war steamers. A certain time was fixed therein for the completion of two of such vessels, (1st of October,

Secor et al. v. Law.

1848,) and a certain other time for the completion of two more, (1st of October, 1849,) a certain vessel (the Missouri) was therein adopted as a model, and the details of the construction of such vessels were given therein. United States officers were to be employed on board of such vessels, and apartments provided for them. An annual compensation for all the services to be rendered by Mr. Sloo was provided for in such agreement, (\$290,000,) and the Secretary of the Navy was authorized to take such ships at any time at an appraised value.

In August, 1847, Mr. Sloo assigned such contract to the defendant and Messrs. Roberts and McIlvaine, by an instrument in writing, under seal, upon certain trusts therein contained; by such instrument, which was tripartite, the defendants, Messrs. Roberts, Crosswell, and P. M. Wetmore, who were parties thereto of the second part, agreed to build the requisite steam vessels under such contract, with their machinery, and to furnish all necessary funds for that purpose; such steamships and their machinery to be built or constructed, under "*the superintendence, direction and 'control'*" of the defendant; by it the vessels when built were required to be registered in the names of the defendant, and Messrs. Roberts and McIlvaine, who were parties thereto of the third part, they were to appoint all officers for navigating such vessels, except their commanders; to appoint all agents for managing the business; to make all contracts for the employment of such vessels; to receive their freight and earnings, and all sums due for transportation of the mails, and disburse all moneys. By such instrument it was also made the duty of such trustees to render quarterly accounts of their receipts and expenditures, and after deducting all disbursements to pay a certain sum (\$6,250) quarterly to Mr. Sloo, and a like sum to the defendant and Messrs. Crosswell, Roberts, and P. M. Wetmore, jointly, and to apply the residue of such net earnings to reimbursing any advances made by them, with interest, and a commission of ten per cent on the amount of such advances, and to divide the remainder.

thereof, equally, between Mr. Sloo and the parties to such agreement of the second part. The defendant and Messrs. Roberts and McIlvaine were also constituted thereby, trustees of an undivided half of such vessels, for Sloo, and of a like half for the defendant, Messrs. Roberts, Croswell, and P. M. Wetmore, jointly.

Provision was made in such instrument for appointing trustees in the place of those named therein, and an agent in the place of Mr. Croswell, in case either of them should die, resign, or become incapable of acting; the parties of the second part thereto having the right of appointing in place of Mr. Roberts or the defendant, and Mr. Sloo that of appointing in place of Messrs. Croswell and McIlvaine. It was also provided in such instrument, that Messrs. Roberts and Croswell should be the agents of such vessels in New York, and that each of them, as well as the defendant and Mr. McIlvaine, should receive a certain salary (\$5,000) for the services to be performed by them under such agreement.

It was also agreed in such instrument, that the trust should be closed by the trustees by a sale of the ships at public sale, and after paying expenses and reimbursing what was due to the parties of the second part and the trustees, the residue of the proceeds should be equally divided between the parties thereto of the second part and Mr. Sloo, equally. Provision was also made therein for admitting other associates into the undertaking. The trustees by such instrument accepted the trusts therein contained, and agreed to carry them out.

In October, 1847, the defendant, Messrs. Roberts, Croswell, P. M. and B. O. Wetmore, made two written contracts for the construction of two of the vessels specified in such contract, one with Messrs. Smith & Dimon, for the Georgia, and the other with Messrs. Bishop & Simonson for the Ohio, each for the sum of \$110,000, payable by installments, such vessels to be completed in one year from the contract.

In the course of the construction of such vessels, in August, 1848, a written contract was signed by the

Secor et al. v. Law.

defendant, with his own name, and by the members of the firm of T. F. Secor & Co., consisting of the plaintiffs and Messrs. Breasted and Quintard, with their separate names, for the construction of four marine steam engines, with eight boilers and other apparatus complete, and putting up two of such engines and four of such boilers in each of the before mentioned vessels. Such contract purported on its face to be made between the firm of Secor & Co., as parties of the first part thereto, and the defendant Roberts, P. M. and R. O. Wetmore and Crosswell, as parties thereto of the second part. By it the parties thereto, of the first part, in consideration of the agreement of the parties of the second part therein, agreed to put up two of such engines and four of such boilers in one of such vessels, before the 9th of May following, and in the other, before the ninth of July following. Specifications were annexed to such contract, describing the materials, dimensions and other details of the work, and the whole was required to be done under the superintendence of the defendant. For the whole of such work, Secor & Co. were, by such contract, to receive from the parties thereto of the second part a certain sum, (\$300,000,) by installments.

The plaintiffs' firm did not complete the work in such contract until after the time fixed therein for its completion, to wit: In one vessel in September, 1849, and in the other in January, 1850. At the defendant's request, they also built some coal bunkers, and did other work connected therewith, exceeding in value a certain sum, (\$11,000,) on board of each vessel.

Messrs. Breasted and Quintard, partners of the plaintiffs, assigned their interest in all the claims to the latter, before the commencement of this action.

The complaint originally set up three separate causes of action, to wit:

1. The reasonable value of certain work done and materials furnished by the firm of T. F. Secor & Co., consisting of the plaintiffs, and Messrs. Breasted and Quintard, at the defendant's request, in building four steam engines and

eight boilers on board of two vessels, (the Ohio and Georgia,) completed in January, 1850, on which a certain sum (\$3,000) is claimed to be due.

2. The reasonable value of certain extra work done and materials furnished by the same firm on board of the same vessels, at the defendant's request, between September, 1849, and February, 1850, claimed to exceed a certain sum, (\$28,600.)

3. A balance found due on an accounting for certain work done and materials furnished on board of the same vessels, between the plaintiffs and the defendant, exceeding a certain sum, (\$11,900,) for one vessel, and another sum, (\$11,400,) for the other, exclusive of a certain sum, (\$3,000,) due on the original contract, which sums the defendant promised to pay the plaintiffs' firm.

Another cause of action was added to the complaint, by way of amendment, by leave of the Referee, on the trial, after the testimony was closed and the cause submitted. In it the defendant is alleged to have been indebted to the plaintiffs' firm in a certain sum, (\$3,000,) for a balance due on an amount agreed by him to be paid for the construction of certain steam engines and boilers, to be placed on board of the vessels in question, and a further sum exceeding a certain amount, (\$28,600,) for other work and materials put on board of such vessels, and for certain wharfage: that the defendants claimed damages for the non-completion of the work within the time agreed upon, and finally that an accounting took place of such amounts and damages, and a balance was found due to the plaintiffs' firm, amounting to near a certain sum, (\$26,300,) which the defendant promised them to pay.

The complaint contains proper averments of a release by Breasted and Quintard of their interest to the plaintiffs.

The defendant, in his answer, denies that any such work or materials as were described in the complaint were done at his request, or that he promised to pay for them, or that they were worth the amount claimed; but he alleges, if

done or furnished, they were so done or furnished for him, jointly with Messrs. Roberts, Oroswell and the two Wetmores, who were jointly interested in such vessels, and that the plaintiffs were paid therefor.

The answer also claims that Roberts, Oroswell and the two Wetmores should be made parties, and that the complaint is for that reason defective.

Such answer, further, by amendment, takes issue on all the facts stated in the amendment to the complaint.

It also contains a claim or set-off for damages to a certain amount, (\$30,000,) for the failure of the plaintiff to complete the work undertaken by him in the original contract within the time therein fixed, and a like sum for a similar failure under a similar contract with the defendant alone. The defendant prays judgment that such sums may be deducted from, or set off against any sum recovered by the plaintiff in this action.

The plaintiffs, in their reply to the original answer, take issue upon all new matter therein constituting a new claim; they also therein allege the contract set out in the complaint to have been made with the defendant alone, and not with him and the other persons mentioned in the answer; also, that both the contracts therein mentioned were entered into with the understanding that the time should be extended as long as was necessary, to enable the plaintiffs' firm to complete the work; also, that in consideration of the premises, and the agreement by the plaintiffs' firm to do the extra work mentioned in the complaint, the defendant extended the time for the completion of the work under the original contracts, and that when completed, the engines and appurtenances constituting such work were accepted by the defendant as a full performance by the plaintiffs' firm of their contract. The reply also contains, as a separate defense to the counterclaim or set-off set up in the answer, an accounting had between the plaintiffs' firm and the defendant, of the amount due to the former, and that claimed by the latter as damages for the delay, and that the excess due for the former over

the latter was agreed upon between them, and was the sum claimed in the complaint.

The issues of fact in the action were tried before Robert Emmet, Esq., to whom the same were referred for trial.

The Referee found, by his report, the making of the original agreement with the Secretary of the Navy, the assignment of such agreement to the defendant and others, also the other contents of the instrument in writing, before mentioned, containing such assignment; the assumption by the defendant of the superintendence of the construction of the vessels in question, the contracts for their making, before mentioned, and an employment by the defendant, of the plaintiffs' firm, to make the engines and boilers for such vessels, and the signing of the contract with the specifications, before mentioned, for such work, by the defendant. He also found that the actual price verbally agreed upon between the plaintiffs' firm and the defendant for such work, at the time of such contract, was a less sum (\$270,000) than that set out in the complaint, (\$300,000,) and a written receipt was given by the plaintiffs for the difference, (\$30,000,) without anything being paid. That it was also simultaneously verbally agreed that a certain part (\$45,000) of the price of such work should be paid by a conveyance by the defendant to the members of the plaintiffs' firm, of a piece of land on the southerly side of Ninth street, in the City of New York, and a separate written agreement to that effect, signed the same day.

The Referee also found, in and by such report, that none of the members of the plaintiffs' firm, at the time of signing the contract with the defendant, knew or were informed of any interest of Messrs. Roberts, Croswell, or the two Wetmores, or either of them, in such steamships, further than by seeing their names therein; and that in all transactions, after signing such contract, the plaintiffs' firm dealt wholly with the defendant; and had no actual dealings or communications with, and received no directions or payments from any of such parties.

The Referee further found by his report, that the plaintiffs' firm completed their work under the defendant's superintendence, without unnecessary delay. That the plaintiffs' firm did a large amount of extra work in both of such steamships; and that the times limited in the original contract were insufficient for the performance of work; but were inserted at the defendant's request, in order to enable him to satisfy the United States Government, that he had made a contract to comply with his arrangement with them; that the completion of the work was delayed by the want of decision of a superintendent employed by the defendant, by attack of cholera among the workmen employed, and by the breaking of a derrick, but not by any fault or negligence of the plaintiffs' firm. Such Referee further found the times at which the contemplated work was completed.

The Referee further found that the work and materials on both vessels were accepted by the defendant; also, that the defendant paid to the plaintiffs' firm, in cash, at various times to a certain date, (21st of April, 1849,) on account of the contract with them, a certain sum, (\$135,000;) executed a conveyance to them, on like account, of the property in Ninth street, in May, 1849, for a certain sum, (\$45,000,) and gave them, on like account, fifteen promissory notes made by him, payable at five and six months after date, without interest, at various times from June, 1849, to February, 1850, amounting in all to the sum of \$87,000.

The Referee also found in and by his report, that in the spring of 1850, after all the work had been done, and materials furnished by the plaintiffs' firm, which they had been employed by the defendant to do, they demanded of him the residue due on the original contract, and presented their bills for extra work, exceeding the sum of \$28,500; that the defendant objected to some of the items of such bills, and claimed damages for non-completion of the work within the time, and an accounting was then had between the plaintiffs' firm and the defendant, of and con-

cerning all the matters aforesaid, and the moneys due by the latter to the former on the original contract, and the extra work and the damages claimed; and after making allowances for such damages, and other deductions claimed by the defendant, the amount due to the plaintiffs' firm was liquidated and agreed upon between them at the sum of \$26,295.79, which the defendant, in consideration of the premises, agreed to pay the plaintiffs' firm.

The Referee also found, by such report, that the defendant rendered to the trustees named in the before mentioned assignment in trust, his account for his expenditures on account of the work done upon such steam vessels, in which he charged as cash paid by him, the sum allowed to him by the plaintiffs' firm for the property conveyed to them by him on Ninth street, at the date of such conveyance, and the amount of the notes given by him in satisfaction of the amount due on such contracts at the date of such notes; that he accounted with such trustees respecting all his disbursements on account of such undertaking, including interest on the amount of such notes from the time of their date, and was paid the same from the trust fund; that he did not inform such trustees that he had not paid such sums in cash; and that in such account so rendered by him was contained an item of a certain amount, (\$25,588.99,) which the co-trustees and associates of the defendant agreed should be allowed to him on such accounting, as cash paid by him, he agreeing to assume to pay to the plaintiffs' firm the residue due to them on the original contract, and for extra work, in consideration whereof such amount was allowed to and paid to the defendant by such trustees. The Referee further found that such last mentioned sum or item consisted of the amounts claimed for extra work done on such vessels by the plaintiffs' firm and shopwork, with the sum (\$3,000) remaining unpaid on the original contract, less certain sums claimed to have been paid by the defendant to various persons.

The Referee also found, as a fact, that notice was given by the defendant to the plaintiffs' firm on occasion of

Secor et al. v. Law.

each of the payments made by him to them, that he did not intend thereby to waive his claim for damages for not completing the work in time; and receipts for such moneys were given by the plaintiffs' firm written upon such notices, and upon the terms therein specified.

The Referee adopted, as conclusions of law :

1. That no conversations between the plaintiffs' firm and the defendant, as to the time limited for the completion of the work in question, could vary the terms of the written contract for such work, and that nothing said prior to its execution could affect the claim for damages for the delay.

2. That the claim for such damages having been included in the accounting between the parties, in 1850, and then allowed for, the defendant could not now set up any claim therefor.

3. That the accounting between the defendant and his associates, in the year 1850, and the allowance and payment to him of the sum then paid to him, (\$25,588 99,) and his promise to pay the plaintiffs' firm the amount agreed upon, constitute an answer sufficient in law to the defense of any non-joinder as defendants of those who were associates in the building of the steam vessels in controversy.

4. That the plaintiffs are entitled to recover of the defendant the sum of \$45,143.27.

Exceptions were filed to the finding of facts of the Referee, by the defendant, including most of the facts found by him, and particularly as to the separate employment of the plaintiffs' firm, by the defendant, the ignorance of the former of any interest in any other person except the defendant, in the contract, otherwise than by the insertion of the names in the contract, and the exclusive dealing by them with him; the non-occurrence of any delay by the plaintiffs' firm in completing the work within time; the accounting by the defendant with the plaintiffs' firm and his promise to pay; the accounting by the defendant with his associates, his receipt from them of the sum charged, and his promise to them to pay the plaintiff and his firm.

Various requests were made on the trial, to the Referee, to decide various points, including the defect of parties by the non-joinder of the persons named in the answer; the right of the defendant to recover damages; and a supposed defect arising from the non-joinder of Horace F. Clark, Esq., as joint plaintiff, by reason of a supposed interest in the action. Various requests were made by the defendant's counsel, to the Referee, to insert various other findings of fact, with which he refused to comply, and exceptions were filed to such refusal.

Exceptions were taken by the defendant to the admission of evidence to establish the following facts, viz.: 1. That the original contract price for the machinery was a less sum than that mentioned in the complaint; 2. That the receipt for the sum of \$30,000, given at the time of making the contract, was so given without the payment of any money; 3. That the Trustees and others interested in the vessels in question, were ignorant that the defendant had paid part of the contract price by land and in his notes; 4. What the consideration was for a release by Sloo to the defendant, the latter being under cross-examination; 5. The inconsiderable character of work done on another vessel while this contract was running, which was offered after testimony of the defendant had been admitted; 6. That the work on such vessel was productive of delays in completing the machinery of those in question; and, 7. That the contract for doing such work was made after the contract in question.

Requests were made by the defendant's counsel, to the Referee, on settling the case, to alter his findings of fact, which he refused, except as to an immaterial finding, and exceptions were taken to such refusal.

Other facts, material to the case, appear in the opinion of the Court.

H. Goodman and *H. W. Robinson*, for the defendant, (appellant.)

I. Defendant was entitled to judgment upon his defense that the work, &c., were done and furnished for him,

Secor et al. v. Law.

jointly with Roberts, the Wetmores, and Crosswell, and that they were necessary and proper parties; the complaint was defective in consequence of their omission.

(1.) As co-owners they were liable, jointly or *in solido*, for the engine, boilers, and other tackle and furniture necessary for the completion and fitting out of the vessels. (3 Kent's Com., [4th ed.,] 154, 156.)

(2.) All rights growing out of the contract as against T. F. Secor & Co., for delay in completing the engines and boilers, belonged to them as such joint owners.

(3.) The contract with T. F. Secor & Co. was expressed to be made with them jointly.

(4.) The defendant having acted for himself and his associates jointly, the burden of proof rested on the plaintiffs to show that his acts were without the authority of his associates. (Chit. on Cont., 227.)

(5.) No signature by them was necessary to give the contract effect as against them. (Chit. on Cont., 71; *Clason v. Bailey*, 14 Johns., 484.) And the signing by defendant alone, in the avowed and known business of himself and his associates, did not render it his individual contract. (Chit. on Cont., 249; 3 Kent's Com., [4th ed.,] 41 to 44; 1 Pars. on Cont., 162; Chit. on Bills, [11th Am. ed.,] 57, note 2.)

(6.) It would have been a breach of duty on his part to have contracted or acquired any rights, individually, in relation to the joint business of himself and his associates, and, by the declaration in the contract, he expressly disclaimed any such individual responsibility. (Story on Part., §§ 177, 178.)

(7.) The trust deed provided that these vessels should be built by the associates, and that defendant should merely have the superintendence, direction, and control of the construction.

(8.) Every presumption of law was, that the parties intended to act in conformity to the known rights of all parties concerned, and that all dealings with the defendant within the known scope of the joint interest of himself and

other parties, were on joint account. (Story on Agency, §§ 37, 124; Smith's Mer. Law, [ed. 1843,] 93; 3 Kent's Com., 43; *Willst v. Chambers*, Cowp., 814; *Alexander v. Barker*, 2 Crompt. and Jer., 133; Oro. Car., 550.)

(9.) It is no objection that this defense was united with defenses upon the merits. (*Sweet v. Tuttle*, 4 Kern., 465.)

II. The Referee erred in neglecting to find, one way or the other, upon the issue of fact presented, whether or not the contract was made by the defendant jointly with his co-owners in the vessels, and as required by the issues and particularly requested; and in holding "that the accounting between the defendant and his associates, and the allowance and payment to him of the sum then paid to him by them, and his assumption to pay the balance due T. F. Secor & Co., and his promise to them to pay the amount agreed upon, on the accounting between him and them, constitute an answer, sufficient in law, to the defense of non-joinder."

(1). The finding of fact on which this conclusion is based, that the said defendant, after the account of the cost, &c., rendered by him to the trustees, had an accounting with his associates, &c., is unsupported by the evidence.

The account presented by him was rendered to the Trustees under the Sloo Trust.

Although assented to by the trustees, it in no manner concluded the co-owners as to their liabilities, as between themselves, for the unsettled claims.

The item (of \$25,588.99) stated in this account as the balance of the claim of T. F. Secor & Co., and as part of the cost of the vessel, was in no manner represented by the defendant as a disbursement that had been actually made by him individually, or by him and his associates jointly. Its true character was explained, and the assumption by him, (to which plaintiffs' witnesses testified,) was only "as far as the trustees were concerned;" if the amount was to be charged thereafter, it was a matter to be settled between the co-owners and associates.

There is no evidence how this outstanding claim was ever (if at all) arranged between them, or that it ever entered into any computation or adjustment of their accounts as between themselves.

No occasion was shown when there ever was a meeting of the associates, or when any such assumption was made by the defendant to or with them.

It appears, on the contrary, that the expected settlement of that item, by an offset of the damages sustained by the co-owners, by reason of the delay in finishing the engines and boilers, was intended to be made for the benefit of the associates.

(2.) But even a subsequent receipt by defendant of full contribution from his associates for this item, and his agreement with them that he would individually pay it, would not modify the rights of the parties, under the original contract. (1 Saund. Pl. and Ev., 17; *Lodge v. Dicus*, 3 B. & Ald., 611.)

(3.) If such an agreement inured to the benefit of T. F. Secor & Co., it could only furnish a new cause of action against the defendant individually.

No such cause of action was alleged or could be considered by the Referee.

III. The Referee erred in admitting in evidence, on the part of the plaintiffs, various irrelevant matters, which could not fail to have prejudiced his mind against the defendant, in his relation both as a party and witness.

IV. His report, in various respects, evinces a bias against defendant, or an incorrect appreciation of the evidence.

V. He erred in finding, as matters of fact, that plaintiffs duly performed.

VI. He erred in finding, as matter of fact, that, on the liquidation of the amount due on the bills of T. F. Secor & Co., for the work in question, an accounting was had, and that, after making allowances, by reason of damages for delay, and other deductions claimed by the defendant, the amount was ascertained.

The damages were a proper subject of counterclaim,

although they belonged to defendant and his associates. (*Platt v. Halen*, 23 Wend., 456.)

VII. He also erred in the finding of fact mentioned under point II above.

VIII. The Referee erred in allowing the plaintiff to amend his complaint by adding a new count.

He had no authority to allow the addition of a new cause of action to those previously stated in the complaint. (*Union Bank v. Mott*, 10 Abbott's Pr., 372; *Edw. on Ref.*, 33.)

His power was limited to such amendments as are defined and limited by § 170 of the Code.

IX. The exceptions to the report of the Referee, and also those taken to his refusal to find as requested by the defendant's counsel, were well taken.

Horace F. Clark, for plaintiffs, (respondents.)

I. The dealings were between Secor & Co. and defendant in his individual capacity. Roberts and others, although interested, were not contracting parties.

II. The original employment of Secor & Co., and the bargaining with them, was by defendant personally, and at that time no mention was made of any other parties, as being interested.

The circumstances, that Roberts and others were interested and that their names were introduced in the contract presented, are overcome by the facts that Roberts and others did not sign the contract; that defendant alone signed it; that he alone made the payments under it; and by the mode of such payments and of his accounting, of his receipts of a balance and his undertaking, all of which show that he treated such agreement as an individual undertaking of his own.

III. It appears in evidence that the construction of the engines of the "Ohio" and "Georgia" was a separate undertaking of the defendant, and that Roberts was not one of the contracting parties. The defense of non-joinder must, therefore, fail.

Secor et al v. Law.

IV. Had the contract in question been the joint contract of the defendant, Roberts and others, the plaintiffs, would, nevertheless, have been entitled to recover against Law alone.

(a.) The liquidation of the account between defendant and Secor & Co., the abatement of a portion, the allowance of promissory notes as cash payments; the express assumption of the balance by the defendant, in connection with his receipt of such balance from his associates, and his promise to them to pay the plaintiffs' claim, created a liability independent of the original contract, which liability could be enforced in this action.

(b.) Contribution having been in fact made by the associates of the defendant, and his account with them settled on the basis of his individual assumption of the obligation to the plaintiffs, he has no right to demand that his associates should be sued, even though possibly the plaintiffs might, at their election, have been entitled to maintain an action against all the parties in interest.

V. The finding that the claim for damages for delay was allowed for in the settlement between the defendant and Secor & Co., is fully supported by the evidence.

ROBERTSON, J. The defendant's objection of want of proper parties, is confined to the original contract for building and putting up the machinery in question, and the additional work and materials furnished by the plaintiffs' firm, and does not extend to any subsequent valid undertakings of his. The plaintiffs' reply sets up, apparently, four defenses to the claim for damages in the answer, besides a general denial that any damages arose from the cause assigned, to wit: 1st. A contemporaneous agreement to extend the time, from the impossibility of completing the work within that fixed therefor. 2d. A subsequent agreement to do so in consideration of extra work to be done by the plaintiffs' firm. 3d. An acceptance, by the defendant, of the engines and boilers, when completed, as a full performance of the contract; and, lastly, the inclu-

Secor et al v. Law.

sion of such damages, in an accounting, and a balance agreed upon after allowing the same, being the same accounting as that set out in the third cause of action in the complaint.

The Referee has not found, distinctly, with whom the plaintiffs' firm agreed to do the work in question, nor to whom they gave the exclusive credit; he has, however, found that the defendant employed such firm to do such work, and that the contract in writing, although purporting to have other persons parties thereto, who are named therein, was signed only by the members of the plaintiffs' firm and the defendant; also, that by a simultaneous agreement, a piece of land was agreed to be taken by the plaintiffs' firm as part of the price of such work, under a conveyance from the defendant; and that, in all subsequent transactions, the plaintiffs' firm dealt wholly with the defendant, and neither dealt with, nor received communications from the persons named in the answer. That the defendant paid part of the contract price by a conveyance of the land agreed upon, and obtained a credit on the payment of other installments, by the delivery of his promissory notes therefor, at five and six months without interest; while he charged his associates with the land and promissory notes as cash paid, and drew interest on the latter, in a settlement with them.

Moreover, there is direct testimony that the defendant is the only person with whom the plaintiffs' firm dealt in such contract; the land conveyed belonged to a bank, in which the defendant had a large interest and of which he was president, and in which there is no proof that any of his associates had any interest; he claimed to give his promissory notes without interest, because the contract was not completed in time. Receipts for such notes are annexed to notices of non-waiver, signed "George Law & Co.;" which speak of "my rights and claims * * under your contract with George Law, &c." Such receipts are in favor of the defendant alone, there being no evidence that any such firm as George Law & Co. ever existed. The

evidence, which is considerable, of dealings exclusively between the defendant and his associates, tending to show that, as between them, the former was considered as the contractor, is, of course, not to be regarded on this question of giving credit, as the plaintiffs' firm were not parties thereto; although it may be available for other purposes.

It would be very difficult to say, from the testimony in this case, if the contract was not made exclusively with the defendant, with whom it was made. There is no evidence of any authority given to him to bind any person thereby, except the parties to the original assignment in trust, unless the mere joint ownership by himself, and the parties named in the answer, of the hulls of the vessels, entitled him to incur a debt of \$300,000 for machinery to put on board of them, so as to convert them into steamboats. The written contract was signed by the defendant alone, and although, possibly by its form, it may have given all the persons named in it a right of action against the plaintiffs' firm for a breach of their obligations contained in it, it gave none to them against any one but the defendant. If such contract can be laid aside, and we are at liberty to go into an inquiry as to the persons for whose benefit and by whose authority it was made, we shall find, unless we go back to the assignment in trust, that the only authority of the defendant consists of his joint ownership of such hulls. There was no agreement of any kind proved between the defendant, Roberts, Crosswell, and the two Wetmores, as between themselves, that they would complete the vessels as steamboats for any purpose, although they jointly agreed with others that they would do so, as they also did with others, to build the vessels. If they had so agreed, as between themselves for the purpose even of carrying out the contract with Sloo, there might have been such a joint enterprise, and to such extent as to have entitled any of the partners in it to bind the others by a contract to do what was necessary to complete it or carry it on. (*Staats v. Howlett*, 4 Denio, 559.) If the joint enterprise, (to which the completion of

the vessels as steamboats, by placing machinery therein, was essential,) was that which was entered into by the assignment in trust, the defendant had as much authority to bind Mr. Sloo, who was to own equitably one-half the boats, and be entitled to half the profits, and Mr. McIlvaine, who was to be the owner at law as joint tenant of one-fourth of them, and to be entitled to a yearly salary of \$5,000 from their earnings, as he had to bind any of the parties who undertook to build them. In such case both of them would be necessary parties to the suit, while Mr. R. C. Wetmore would have no interest in it; and if the objection for want of parties, as taken, be governed by the same rules as a plea in abatement, it must be overruled.

But it is said that the joint ownership of the hulls entitled the defendant to equip them as steamboats with proper machinery. I have not been able to find any authority which goes so far as to hold that the joint owners of a hull, which has never been used for a steamboat, are authorized as agents for each other to make contracts to convert it into one, by building machinery and putting it on board, however fitted it may be for such use, or unfit for any other. They are but tenants in common of it, not partners, (*Nicoll v. Mumford*, 4 Johns. Ch., 522,) and whatever may be their rights as such, to prevent it from being destroyed in the form in which it has been completed, for want of repair, they do not extend to so material and expensive an alteration of its character as placing steam engines on board at the expense of all, without the express agreement between the owners, which would make it a joint enterprise.

The findings of the Referee, however, and the evidence already alluded to, justify us in arriving at the conclusion as a fact, that exclusive credit was given to the defendant by the plaintiffs' firm in all the contracts between them. One of that firm testifies that "he supposed those mentioned in the contract were interested in the engines, but "as Mr. Law only signed it, *he was the only party with whom we were dealing*, we considered him good enough."

Secor et al. v. Law.

The contract was signed by the defendant with his own name only, not professing to act for any one else, agreeing thereby to pay certain sums on certain days. By a cotemporaneous contract, he agreed to convey land in which he alone was interested, as part of the price of the machinery, without proof of any consent on the part of any associate to take it at that price. Notices were subsequently given by him, signed with his own name, and the addition of "& Co.," there being no proof of any person carrying on business in that firm name. In them he speaks of "*my* rights and claims under your contract," not with us, (which might have identified the firm or partnership intended,) but with "George Law, &c." Upon those notices receipts are given to the defendant for his own promissory notes, running at long dates as cash; and it is proved that he induced the plaintiffs' firm to give him the credit on those notes, by representing that he had suffered damage by the delay in the work, while he himself was in fact allowed interest on them as cash payments in his dealings with the parties jointly interested in them. All dealings and communications in relation to the subject of the contract are had with him only, he alone had the direction and superintendence of the work, and he finally adjusted the account and promised to pay it. Even without reference to the doubtfulness of the defendant's authority to bind any one else, and the probability of the plaintiffs' firm preferring the certainty of taking one paymaster, whom they thought good, instead of the uncertain liability of others, the Referee would have been warranted in finding, from the facts so proved, that exclusive credit was given to the defendant in all the contracts; and we are entitled to supply that finding, if necessary, to sustain his report. (*Grant v. Morse*, 22 N. Y. R., 323.)

There is no need of authority to show that exclusive credit may be given even to one of several partners, so as to make him individually liable, as readily as though he had indorsed with his own name a promissory note of the firm, or otherwise guaranteed their responsibility; and

more particularly where, as in this case, the form of the contract notified the plaintiffs that there were other parties interested. There is much more reason for making a partnership liable on a contract made for their benefit by a partner in his own name, where he conceals their interest, than where he discloses it. The very fact of taking the contract in such case in a form to bind him only, is almost conclusive evidence that the other contracting party did not intend to look to the partners. As, therefore, the evidence in this case would be abundant to establish, in an action against the persons named in the answer, a defense by them that the contract was exclusively the defendant's, and not theirs, there is no error in the Referee's conclusion on that point.

Even, however, if no such fact appeared in the case, upon the first written contract, the defendant made himself liable by signing it; there was sufficient consideration for the obligation, and there was no proof that he did not intend to be bound until others signed it, (*Parker v. Bradley*, 2 Hill, 584,) nor did he sign it, nor was he described in it, in any representative capacity. (*Lincoln v. Crandell*, 21 Wend., 101.) The rule of law, that his signing it does not prevent the plaintiffs from reaching his principals, where the contract is by parol, (*Chitty on Cont.*, 249; 1 Pars. on Cont., 162; 3 Kent's Com., [4th ed.,] 41-44,) will not the less make him liable, in such a case, upon it as surety, as much as though he had indorsed their notes.

I am by no means satisfied that the defendant has not waived his objection of non-joinder of parties, by setting up a counterclaim in favor of the same parties against the plaintiffs. Such a claim would clearly be inadmissible, if the claim of the plaintiffs were against the defendant alone; and yet, if both the objection and counterclaim are to prevail, the defendant can avail himself of an action which he claims cannot be maintained, in order to recover a claim which could only be sued for in an action, by those whose absence as parties to the suit, he alleges makes it defective. The Code does not provide

Secor et al. v. Law.

for objections to a counterclaim for want of parties, nor how such a defect is to be taken advantage of, while the case of *Platt v. Halen*, (23 Wend., 456,) warrants an offset, notwithstanding a defect of parties. That would prevent the answer from being demurrable, and if it is a good pleading, clearly the defendant would be entitled, on proving the facts contained in it, to judgment therefor, whatever was the fate of the plaintiffs' claim. A pleading, therefore, which seeks to defeat the plaintiffs' action, upon facts which alone entitle the party pleading to make the claim which he sets up in such action, is at least an anomaly. The result of a successful objection, for want of parties, is not a total defeat, but only an abatement of the plaintiffs' action, while the defendant may obtain absolute judgment for the claim, against which, in an action brought directly upon it, the plaintiffs would have a right to offset their claim now in suit.

From the testimony of a clerk of the trustees of the vessels in question, under the assignment from Sloo, it appeared that the defendant was paid by them a certain sum, (\$25,588.99,) charged by him in an account, to reimburse him for that sum, as due to the plaintiffs' firm. At the time, as such witness states, "It was stated by the defendant that that sum was a disputed item between himself and the contractors for the engines of the Ohio and Georgia; * * when the matter was settled a voucher was to be produced" from the plaintiffs' firm; "he was to procure it." Another witness (Kirby) testifies, that these vessels, with another, were subsequently transferred to another company, to the extent of the interest of the defendant and others therein, for a sum which included the disbursements of the defendant for the construction of the engines and extra work, according to his account rendered to the trustees, he being then their constructing agent. That in June, 1850, during the examination of such accounts, the defendant said: "that inasmuch as the construction had all been paid for, except as to that one item, the account *had better be closed, so*

"far as the trustees were concerned, and he would assume the settlement of that item with Mr. Secor." Another witness (McIlvaine) testifies, that the defendant desired such item to appear on the books of the trustees, as part of the cost of the engines, in case the United States Government desired to purchase the vessels, and *"that if this sum was never paid to the contractors, he would then pay that part of it which belonged to Col. Sloo, under the deed of trust to him."* If the account rendered by the defendant to the trustees, which was carried into their accounts, the disputed item was entered as paid on the 17th of June, 1850. Another witness (Roberts) states, that when such item was spoken of in the examination of the accounts, as having no voucher, the defendant said *"he would arrange it,"* and it *"was credited to him as a payment by him."* The same witness subsequently adds, that the defendant *"said he would get the voucher for such item, or be responsible for it."* This evidence is amply sufficient to sustain the finding of the Referee, that the defendant accounted with the trustees concerning his disbursements for the construction of the engines and other machinery for the vessels in question, and was allowed the sum due the plaintiffs' firm in settlement of such accounting, and paid the same; and that in consideration thereof, he assumed individually to pay the plaintiffs' firm the amount so due to them. This would enable the plaintiffs to maintain an action on that promise against the defendant alone.

The defendant being individually liable for the claim of the plaintiffs against him, the next question which arises is whether he had any claim for damages which could be deducted or set off. The work, concededly, was not finished within the time agreed upon, and if nothing was done to waive the claim for damages therefor, it still remains. A difficulty might arise as to the right to set it off, if the plaintiffs' claim be against the defendant alone on an individual liability. It might be available as a recoupment in mitigation of damages, but the answer does not claim it as such. (*Nichols v. Dusenbury*, 2 Comst.,

283; *McCullough v. Cox*, 6 Barb., 386.) The parties who were prejudiced by the delay consisted of all the owners of the vessels, and the defendant could not recover and retain such damages as entirely his own on an independent cause of action. In addition to this, the claim in this case was for a sum certain, and belonged only to the two plaintiffs; the claim for damages was unliquidated, and was against the plaintiffs and two others, who were not parties to the action. It would seem, therefore, that, although the plaintiffs acquired half their interest by assignment, the defendant would have no right to make them alone liable for his claim for damages, (*Vassear v. Livingston*, 3 Kern., 248,) by way of counterclaim under the Code. (*Dillaye v. Niles*, 4 Abb., 253; *Ferrerira v. Depew*, Id., 131; *Davidson v. Remington*, 12 How., 310; *Van de Sande v. Hall*, 13 Id., 458; *Spencer v. Babcock*, 22 Barb., 327.) It does not appear, also, that the claim would be available by way of set-off. The 112th section of the Code has been held not to affect the substantial rights of assignor and assignee as to set-offs under the Revised Statutes, (*Beckwith v. Union Bank of New York*, 5 Seld., 212, affirming 4 Sandf., 610,) and unliquidated damages are not a subject of set-off. (*Brown v. Cuming*, 2 Cai., 33; *Hepburn v. Hoag*, 6 Cow., 613; *Wilmot v. Hurd*, 31 Wend., 584.) But there is sufficient in the record in this case to defeat such claim on the merits.

The Referee properly disregarded the evidence offered to vary the written contract as to the time of completing the work provided for in it, although the defendant claimed the right to reject such written contract, and to hold the plaintiffs to some other contract made by him on behalf of the owners of the vessel; and if the plaintiffs yielded to the proposition of the defendant to deceive the United States Government, by the insertion of a time within which the work could not be done, they would be justly punished by being made to pay damages for lending themselves to the deception, as the defendant would, for the same reason, have been, by being compelled to pay

the fictitious \$30,000 added to the price for the like purpose of imposition.

The facts that plaintiffs and defendant agreed, originally, that the time was fixed in the contract for a different purpose; that the defendant superintended the work while it was going on, and lent the plaintiffs' firm his notes for \$7,500, to be applied on account of the moneys to grow due under the contract, without objection to the non-completion, on the 29th of June, 1849, over a month after the machinery for one vessel was to have been finished; that a variety of misfortunes interfered to prevent a completion of the work in time; that the plaintiffs worked diligently to complete it; that there is no evidence of the communication by the defendant of such claim for damages to the other trustees; that the defendant took a receipt for his notes, without interest, on a notice of a claim of damages,—although no legal excuse for the delay, each tend to diminish any improbability of the defendant's having waived a claim for damages, or accepted such credit on the notes, and other deductions from the bills, as a sufficient compensation. The liquidation of such damages and its merger in the account stated between the plaintiffs' firm and the defendant, after the work was done, and in March or February, 1850, mainly rests upon the testimony of one witness, (Mr. Breasted,) who now has no interest in the action, which is only opposed by that of the defendant. From that testimony it appears that the defendant, on the rendition of the accounts, stated to the plaintiffs that they were behind hand in the work, and he was not going to allow them all the bill; that he was not going to pay wharfage during the delay, and directed them to take out the items complained of and he would settle the bill; those items were taken out as a compromise of the matter, and to close the thing up a new bill was made out, and he said "*he would pay the bills.*" The witness testified "*that this was a general settlement and compromise of every thing.*" This is corroborated, as to the promise to pay, by the testimony of another witness, (Quintard,) who testifies that

Secor et al. v. Law.

the defendant said the bills would be settled after they were regulated; and that of the plaintiff, Secor, who testifies that after the new bills were sent in the defendant said "it was all right and he would pay the bills." The first witness (Breasted) testified, also, that on a previous application by him to the defendant, when he gave his notes, the latter said "that the plaintiffs' firm would be "behind time, and he therefore should give notes instead "of money." If this were an agreement to waive the performance of the contract in time, provided the plaintiffs gave time on the payments, as it might well be construed to be, the defendant would have no claim for damages, and might well be disposed to waive any claim for them afterwards in the final settlement. Taking the testimony together, this Court is not at liberty to say that the Referee was not warranted in coming to the conclusion that the defendant, in his anxiety to close the matter up and be able to arrange the accounts and contracts with the trustees, under the original assignment in trust, either waived all claim for damages, or considered the advantages he obtained in the settlement equivalent thereto; as well as for the same reasons took upon himself alone the burden of paying the plaintiffs.

The defendant objects that the Referee erred by allowing the amendment to the complaint containing a new cause of action. By § 272 of the Code, he has the same power as the Court on a trial; and that, by § 173, extends to inserting allegations material to the case, as well as conforming the pleading to facts proved. In this case the substance of the amendment was already in issue, being contained in the original reply to the defendant's defense or set-off of a claim for damages. (*Hall v. Gould*, 3 Kern., 127.) What was already in the complaint was necessarily part of the amendment, which the court, on application, would undoubtedly have permitted to be added, as the only effect and object of the amendment was to get rid of a technical objection of want of parties. Perhaps a trial is the best place to investigate the good faith of an amendment.

(*Travis v. Barger*, 24 Barb., 627.) The provisions of the Revised Statutes which are not superseded by the Code, (*Perry v. Tynen*, 22 Barb., 137,) give full power to make such amendment, (2 R. S., 424, § 1,) besides this, the defendant waived the objection, by amending his answer. I think, however, the amendment was within the discretion of the Referee, and was properly permitted.

Many facts found in this case by the Referee, being immaterial to the issue or the result, may be rejected without injury, particularly where, as in this case, he states those upon which he exclusively relies to justify his final conclusions of law that the plaintiff is entitled to recover; he puts that solely upon the two accountings which he finds to have taken place, as matter of fact, and that, as matter of law, they excluded the objections of the non-joinder of parties and the claim for damages.

Several exceptions were taken to the admission of testimony, claimed to have been improperly admitted, none of which are tenable. Proof of the non-payment of the \$30,000, at the date of the contract, was relevant for several purposes. A receipt for the amount was produced by the defendant; no charge was made by him for it in his accounts rendered to the trustees, and without an explanation there might be some embarrassment as to the amounts claimed. I do not find in the evidence any attempt to throw any imputation upon the defendant, of an improper motive for such fictitious addition, except that to which the simple fact gives rise; although the defendant did offer evidence casting the imputation of primary guilt on the plaintiffs, without removing his own complicity in it. Attempts to introduce improper evidence, which were defeated by its exclusion, could hardly affect the mind of the Referee unfavorably to the defendant. The fact that the other trustees were ignorant that the defendant obtained credit on the installments by giving his notes, or conveyed land instead of paying money, was important to show that he considered the contract entirely his own, to deal with as he thought proper, and that the arrangement of paying

Burnett *et al.* v. Phalon.

in land or giving time, both on the contract and the payments, was entirely a matter of his own and for his own benefit. The consideration of the release from Sloo to the defendant was admissible, in the discretion of the Referee, on a cross-examination, to test the accuracy of the witness' previous statements. The statement of the inconsiderable character of the work done by the plaintiffs on another vessel, was rendered proper by the attempt on the defendant's part to prove that the undertaking of such work by the plaintiffs, had interfered with the work to be done by them under the contract in controversy, and to diminish the damages which might be claimed for a willful delay.

There being, therefore, no errors of law in the decision of the Referee, and there being sufficient evidence to justify the facts expressly found by him, and all other facts necessary to sustain the judgment, it must be affirmed with costs.

BOSWORTH, Ch. J., and MONCRIEF, J., agreed in affirming the judgment.

JOSEPH BURNETT *et al.*, Plaintiffs and Respondents, v. EDWARD and HENRY L. PHALON, Defendants and Appellants.

1. It having been found as facts by the Judge, before whom this action was tried at Special Term, that the plaintiffs in Nov., 1856, "compounded from cocoanut oil and other ingredients a mixture to be used as a hair-wash, for which they devised as a trade-mark * * * the name or word 'Cocoaine,' that they published the same very extensively, with notice that they had adopted the said name or title as their trade-mark;" and that the defendants in Nov., 1858, "commenced the preparation and sale of a similar compound, in bottles * * *, and with labels under the name and title of 'Cocoine,' and further, (as the fifth finding,) "that the defendants well knowing that the name, word or title of 'Cocoaine' was, and for a considerable time had been, the trade-mark of the plaintiffs, with the wrongful intention of inducing the public to believe that the compound sold by themselves under the name, word or title of 'Cocoine' was that of the plaintiffs, and with the wrongful intention of securing to themselves the benefit of the skill, labor and expense of the plaintiffs, have so closely imitated and

Burnett et al. v. Phalon.

used the aforesaid trade-mark of the plaintiffs as to deceive the public and to injure and damage the plaintiffs; that the word, name, title or device 'Cocoïne' is a spurious and unlawful imitation by the defendants of the word, name, title or device 'Cocoaine,' the aforesaid trade-mark of the plaintiffs."— *It was held*, that the plaintiffs were entitled to a judgment enjoining the defendants from manufacturing, using, selling or in any manner disposing of a compound or preparation with the name, word or title of "Cocoïne" printed or stamped upon the bottles, labels, wrappers, covers or packages thereof.

2. The evidence on which the facts were found is stated in the opinions delivered, ROBERTSON, J., dissenting from the conclusion that it was sufficient to sustain them.

(Before BOSWORTH, Ch. J., and MONCRIEF and ROBERTSON, J. J.)

Submitted, February 11, 1862; decided, March 15, 1862.

The plaintiffs, Joseph Burnett and William Otis Edmands, who were druggists and partners in business, in the year 1857, in the City of Boston, commenced the manufacture and sale of an article of hair oil, compounded of various ingredients, of which the essential element was cocoanut oil. It was supposed by them to be a new article, and they alleged that they invented for it a new name, which was "*Cocoaine*," and that as soon as they commenced the sale of the article, they gave notice, through the newspapers and by their circulars, that they had adopted the word "*Cocoaine*" as their trade-mark.

Edward Phalon, one of the defendants, had sold a similar preparation of cocoanut oil since 1840; and, in 1858, the defendants commenced the manufacture and sale of such a preparation, under the name of "*Cocoïne*."

The plaintiffs brought this action to restrain the defendants from using the word "*Cocoïne*" in the sale of their article, claiming that the use of that word was an infringement of the exclusive right of the plaintiffs to the use of the word "*Cocoaine*." They also claimed damages for the injuries which they alleged they had sustained by the infringement.

The action was tried at a Special Term on the 21st day of April, 1859, before Mr. Justice PIERREPONT, and the plaintiffs had a judgment perpetually restraining the defendants from using the word "*Cocoïne*."

Burnett et al. v. Phalon.

The following opinion was rendered by the Judge :

PIERREPONT, J. It appeared before me, upon the trial of this cause, that the plaintiffs, in November, 1856, compounded from cocoanut oil and other ingredients, a mixture to be used upon the human hair; that they devised a name never before used, by which to mark his said compound, to wit: the name or word "Cocaine;" that they forthwith published in all their circulars and in all the principal newspapers in the country, and especially in the City of New York, where the defendants reside, that they had adopted the above mentioned name or title as a "trade-mark," to secure the public and the proprietors against imposition, and that all unauthorized use of this trade-mark would be promptly prosecuted.

The plaintiffs introduced this article upon the market, and spent, between November, 1856, and November, 1858, some ten thousand dollars in advertising the same. The demand for the article rapidly increased, the sale became large, and the profits were by no means inconsiderable. Each bottle containing the mixture had upon it the following label :

"A PERFECT HAIR-DRESSING.

A PROMOTER OF THE GROWTH OF HAIR.

A PREPARATION FREE FROM IRRITATING MATTER.

B U R N E T T ' S C O C C O A I N E .

For preserving and beautifying the Hair, and rendering it dark and glossy.

The Cocaine holds, in liquid form, a large proportion of deodorized Cocoanut Oil, prepared expressly for this purpose.

No other compound possesses the peculiar properties which so exactly suit the various conditions of the human hair.

It softens the hair when hard and dry. It soothes the irritated scalp-skin. It affords the richest lustre. It remains

Burnett *et al.* v. Phalon.

longest in effect. It is the best and cheapest hair-dressing in the world.

DIRECTIONS.—Apply with the hand or a soft brush every other day, or as often as the case may require, rubbing it thoroughly into the roots of the hair.

To remove Dandruff, Scurff, &c., wash the head with Burnett's Kalliston, rub dry with a towel, and apply the Cocaine as directed.

Prepared only by

JOSEPH BURNETT & CO.,

Boston.

[Entered according to Act of Congress, in the year 1857, by Joseph Burnett & Co., in the Clerk's Office of the District Court of Massachusetts.]”

About two years after the first introduction of this article by the plaintiffs, Phalon & Son, the defendants, residents of the City of New York, commenced the sale of a somewhat similar preparation, put up in bottles not very unlike those of the plaintiffs, and each bottle having upon it a label as follows:

“[Entered according to Act of Congress, in the year 1858, by Phalon & Son, in the Clerk's Office of the District Court of the U. S. for the Southern District of New York.]

PHALON & SON'S COCOINE FOR THE HAIR.

Prepared from highly purified Cocoa Oil.

This preparation possesses extraordinary properties for preserving and beautifying the hair, and also restoring its natural luxuriant and glossy appearance. Apply frequently, by thoroughly rubbing it with the hands into the roots of the hair. When chilled, warm in a water bath or by the fire.

PHALON & SON, Perfumers,

Nos. 197, 497 and 517 Broadway,

New York.”

This mixture has also had a very large sale, with much profit to the defendants.

The plaintiff claims that the defendants have pirated his trade-mark, and asks that damages may be awarded, and that an injunction may issue against them.

The defendants contend that the plaintiffs' compound is an imposition; that their mixture is superior; that the plaintiffs can have no property in the word "Cocaine," and that "Cocaine" is not the same, but a different name, and not calculated to mislead the public; and furthermore, that it is correctly compounded from the French.

There is no evidence that the plaintiffs have committed any fraud upon the public; and which is the superior of the two mixtures, the Court will not consider.

If the plaintiff cannot acquire any property or exclusive right in this name, word or device thus contrived and adopted as his trade-mark, then there is no ground for this action; and if the defendants have adopted a device or name so differing from that adopted by the plaintiff as in no wise to deceive the public or do injury to the plaintiff, then the defendants are not liable in this suit.

By the statute of this State, it is a misdemeanor punishable by imprisonment "to forge or counterfeit, or cause "or procure to be forged or counterfeited, any representation, likeness, similitude, copy or imitation of the private "stamp, wrapper or label usually affixed by any mechanic "or manufacturer to, and used by such mechanic or manufacturer on or in the sale of any goods, wares or merchandise, with intent to deceive or defraud the purchaser "or manufacturer of any goods, wares or merchandise "whatsoever." (Laws of 1850, ch. 123, § 1; same stat. 2 R. S., 4 ed., 880, § 49.)

Thus our Legislature has declared in strongest terms its reprobation of all infringements by one citizen upon another's trade-mark; and, long prior to any statutes upon the subject, it was settled law that a manufacturer, by priority of appropriation of names, marks or symbols, to distinguish his manufactures, acquired a property therein as a trade-mark, for the invasion of which an action would lie, and in the exclusive use of which he might be pro-

Burnett *et al.* v. Phalon.

tected by injunction. This rule of law was recognized so long ago as the case of *Southern v. How*, in Popham's Reports, (page 143,) and in the case of *Croft v. Day*, (7 Beavan Rep., 84,) Lord LANGDALE said: "No man has a right to dress himself in colors or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own."

This was the somewhat noted case of the "Day & Martin Blacking." The defendants made and sold the genuine blacking; their names were Day & Martin; their label had the No. 97 1-2 Holborn Hill, and their device was the Royal Arms of England—whereas the plaintiff, who was the surviving partner of the original "Day & Martin," had upon his label No. 97 High Holborn, and the arms of Day & Martin, quite different from the Royal Arms, and yet the Court directed an injunction to issue.

Lord LANGDALE said, "the defendants' contrivances were calculated to mislead the bulk of the unwary public into the impression that the new concern was connected with the old manufactory; and thus to benefit the defendants to the injury of the plaintiff and to deceive the public."

In the case of *Pidding v. How*, (8 Simon's Rep., 477,) the Vice-Chancellor said: "The defendant was not at liberty to make and sell a mixture of his own under the same designation as the plaintiff had appropriated."

In the case before us, the plaintiff Burnett contrived a name unknown to any language, and sold his mixture under that appropriated designation for two years; advertising during the entire time, and in nearly every important journal in the city, that he had adopted that word or name as his "*trade-mark*."

The "Cocoaine," as he called it, had a great sale, and after its reputation was established through the energy, skill, and money of the plaintiffs, the defendants then

Burnett *et al.* v. Phalon.

commenced the sale of their mixture, under the designation of Phalon & Son's "Cocoïne."

Was "this contrivance calculated to mislead the bulk of the unwary purchasers; and thus to benefit the defendants, to injure the plaintiff, and to deceive the public?"

I have no doubt that an honest answer from the defendants would be affirmative. If Burnett's "Cocoaine" had proved destructive to the human hair, Phalon's "Cocoïne" would not have been introduced under that designation. It was the success of the former that introduced the latter; and where one intentionally (as in this case) so closely imitates the trade-mark of another, the law presumes it to have been done for the purpose of inducing the public to believe that the article is that of him whose trade-mark is imitated, and for the purpose of supplanting him in the good-will of his trade or business. (*Taylor v. Carpenter*, 2 Sandf. Ch. R., 603, affirmed in the Court of Errors.)

Every man has a right to the reward of his skill, his energy, and his honest enterprise; and when he has appropriated, as his trade-mark, letters combined into a word, before unknown, and has used that word, and has long published it to the world as his adopted "*trade-mark*," he has acquired rights in it which the Courts will protect.

The proof is clear that the plaintiff had for nearly two years advertised his mixture in nearly every newspaper in this city, and had published in the same papers that he had adopted the word "Cocoaine" as his trade-mark. The defendant was himself a witness, and he did not suggest that these notices had not been brought home to his knowledge; the conclusion is irresistible, that he was aware of their publication, and that he intentionally adopted "Cocoïne" as a close imitation of "Cocoaine," and for the purpose of deriving profit from the simulated trade-mark.

No one can appropriate a word in general use as his trade-mark, and restrain others from using that word. Burnett cannot acquire property in the word Gin, Wine, Brandy, or Ale, or in any other word known to the lan-

Burnett et al. v. Phalon.

guage and in common use to designate things, or the qualities of things. But the word appropriated by the plaintiffs is not of that character, and it is no hardship to the defendants to be restrained from its use as a trade-mark; he can adopt another designation for his mixture; there is no necessity whatever for this close imitation of the plaintiffs' mark, and the defendants can scarcely have any other motive than by this similitude to derive advantage from the plaintiffs' toil. To this they have no right.

There are some features of novelty in this case, but the general principles which govern it are well settled. (*Gout v. Aleploglu*, 6 Beav. R., 69; *Perry v. Truett*, 6 Beav. R., 66; *Coats v. Holbrook*, 2 Sandf. Ch. R., 596; *Partridge v. Menck*, 2 Sandf. Ch. R., 622; *Howard v. Henriques*, 3 Sandf. S. C. R., 725, [Case of the Irving House;] *Stokes v. Landgraff*, 17 Barb., 608; *Clark v. Clark*, 25 Barb., 76; *Brooklyn White Lead Co., v. Masury*, 25 Barb., 416; *Taylor v. Carpenter*, 11 Paige, 292.)

The plaintiffs are entitled to judgment, and an injunction must issue. The order to be settled on notice.

Upon the usual reference to ascertain plaintiffs' damages, they were assessed at a nominal sum by reason of his refusal to disclose the ingredients of his preparation. The proceedings on this matter are reported in 11 Abbott's Pr., 157 and 12 Id., 186.

The defendants moved at Special Term for a new trial, which was denied, the decision of which motion is reported in 4 Bosworth, 622. Final judgment having now been entered against the defendants, they appealed both from the judgment and from the order denying a new trial.

Eusebius W. Dodge, for defendants, (appellants.)

I. Plaintiffs' judgment rests solely on the ground that he contrived a name unknown to any language, and appropriated it as a trade-mark. But in truth, the word is a properly compounded word, and the legitimate name for

a preparation of cocoanut oil, being compounded of the well known words "cocoa" and "olein."

II. The word "Cocoaine," when applied to an article of perfumery, fairly imports that it is a preparation of cocoanut oil, and thus, when used as the name of a cosmetic, indicates the nature of the compound, so that it cannot be urged that "Cocoaine" is a mere fancy term, having none of the attributes of words or names in common use.

In support of the doctrine that no person can have property in any word used to indicate the name or quality of goods, see the leading cases of *The Amoskeag Manufacturing Company v. Spear*, (2 Sandf. S. C. R., 599,) *Fetridge v. Wells*, (4 Abbott's Pr. R., 144; S. C., 13 How. Pr. R., 385,) *Stokes v. Landgraff*, (17 Barb., 608,) *Williams v. Johnson*, (2 Bosw., 1,) *Wolfe v. Goulard*, (18 How. Pr. R., 64,) *Corwin et al. v. Daly et al.*, (7 Bosw., 222,) *Upton's Trade-Marks*, 187.

The name of a factory, hotel, store or saloon, when employed as a trade-mark, will be protected by injunction for the reason that such names serve to guide the public to a person's place of business; and in that respect they indicate the owner or whoever may be entitled to the good will of the establishment. (See *Howard v. Henriques et al.*, 3 Sandf. S. C. R., 725; *Knott v. Morgan*, 2 Keen's R., 213; *Stone et al. v. Carlan et al.*, 3 Code R., 67; *Marsh v. Billings*, 7 Cushing's R., 322; *Genin v. Chadsey*, 12 Abbott's R., 69.)

It will be seen that this distinction has heretofore been observed in applying the law in this class of cases, and it should still be followed.

III. If the Court shall be of the opinion that the mere contrivance or invention of a word, gives to the inventor an exclusive right to its use as the name of an article of his manufacture, then it is submitted that the defendants should have a new trial upon their newly discovered evidence.

John Sherwood, for plaintiffs, (respondents.)

I. The fact that plaintiffs had acquired a right to the

word *Cocaine*, has been decided by the Judge, and is supported by clear evidence.

The colorable evasion, in leaving out a single letter, only adds to the probability of an intention to defraud plaintiffs and the public. (*Taylor v. Carpenter*, 2 Sandf. Oh., 613, and cases.)

II. The word does indicate the origin of the article, but it does not follow that there could be no property in it. The word is not in use in the English language, or as far as appears, in any language; and the cases which declare that the name of a thing cannot be taken as a trade-mark, apply to such names as are generally used and known.

The leading case of *Gout v. Aleploglu*, (6 Beavan, 69,) is directly in point; here the use of the word "Passendede" as a trade-mark was protected. So is *Wolfe v. Goulard*, (18 How. Pr., 64.) And see *Stokes v. Landgraff*, (17 Barb., 608.)

The rule laid down in *Amoskeag Mfg. Co. v. Spear*, is against the defendant, for he could not with equal truth, use the word "Cocaine," for it had no meaning, (besides suggesting its origin from cocoa,) and the word was a novel and original one, and having no signification in any language.

The distinction raised by defendants' counsel, between signs of places of business and other trade-marks, is not supported by the cases cited.

Nor is this distinction well founded in principle, for the word *Cocaine*, after its adoption and publication by the plaintiffs, directed the public to them as the manufacturers of the article.

There is no decision that the word or device adopted to indicate ownership, or origin, shall not also convey the idea or name of the article to which, for the first time, it is applied. Nor could there be any reason for any such position.

The word *Cocaine* is not, in fact, descriptive, nor does it indicate quality. It is merely suggestive. No one could tell, from seeing the word alone, what the compound is, or its object, quality, or nature.

Burnett et al. v. Phalon.

It is not a scientific or technical term, and is not descriptive as denoting the quality or nature of the material.

Common examples, such as "oxyhydrogen blow-pipe," and similar names, do not apply, because they actually define, describe, designate and explain their subject.

III. A new word may be adopted as a trade-mark. (See cases above cited.)

Could not the plaintiffs adopt any peculiar and original arrangement of letters. Now if, instead of using letters merely as a symbol, the plaintiff coins from them a symbolic word which is new, and at the same time conveys an idea of the ingredients of which the preparation is composed, while it also designates it as of his manufacture, is not that word a device or symbol which he can appropriate, as well as any other arrangement of the same letters?

IV. The word *Cocaine* never before existed in our language. It never existed as a substantive designating any preparation. When used by defendants to designate a hair-wash, it derived that meaning solely from Burnett's use.

V. The criticism of the opinion in this case, in Upton's *Law of Trade-Marks*, written during the pendency of the case, is no more authority than the brief of the defendants' counsel, and the course of argument as to the use of a novel word, is certainly unsupported by any authorities.

The conclusion of the writer, however, that the judgment ought to be sustained, but upon different grounds than those set forth in the opinion of Justice *PIERREPONT*, is well founded, (pages 180, 182.)

This case does present another ground, viz.:

That the word "*Cocaine*," by its appropriation, use for a long time, and known connection with the name of Burnett, had, by relation to his ownership, acquired a distinct recognized meaning, as the word which his compound was known by.

VI. But the law does not favor those who, by imitations, appropriate to themselves the fruits of the ingenuity, labor, and enterprise of others; and the great majority of cases

are decided upon the broad ground that there was a palpable attempt to imitate what others had invented and brought to the notice of the public. The actions of the inventor of the trade-mark are not the subject of investigation so much as those of the imitator. (*Croft v. Day*, 7 Beav., 84; *Howard v. Henriques*, 3 Sandf., 725; *Sykes v. Sykes*, 3 B. & C., 541; *Rodgers v. Nowill*, 5 Man., Gr. & Scott, 109; *Morrison v. Salmon*, 2 Man. & Gr., 385; *Day v. Binning*, 1 Coop. Ch. R., 489; *Ransome v. Bentall*, 3 Law Jour. R., N. S., 161; see also cases cited in Upton on Trade-Marks, page 122; see also *Clark v. Clark*, 25 Barb., 76; *Brooklyn White Lead Co., v. Masury*, 25 Id., 416; *Williams v. Johnson*, 2 Bosw., 1; *Coffeen v. Brunton*, 4 McLean, 516; *Hine v. Lart*, 10 Lond. Jur. R., 106.)

VII. The motion for new trial on the ground of newly discovered evidence, was properly denied.

VIII. It cannot be denied that in truth the defendants did intend to obtain the benefit and advantage of the skill and labor of, and the money expended by the plaintiffs, and that they knew that the word "Cocaine" was meant to be the trade-mark of the plaintiffs, and that they deliberately invaded their rights in that respect, intending to defraud the plaintiffs, and to deceive the public.

BOSWORTH, Ch. J. That the judgment is just, on the facts found, I regard as free from serious doubt. I think the evidence warrants the findings. The only finding of fact, in respect to which there can be any doubt of the sufficiency of the evidence to justify it, is the fifth.

That finding states, that the defendants well knew that the plaintiff used the word "COCOINE" as their trade-mark, and to indicate that the compound on which it was impressed, was their manufacture, and that the defendants fraudulently used the word "Cocoïne" to induce the public to believe that the compound of their preparation, was in fact that of the plaintiffs, and that in this regard their attempt to deceive the public and defraud the plaintiffs has been successful.

Burnett et al. v. Phalon.

Edward Phalon, one of the defendants, testified that he had been in the business of hair dressing 24 or 25 years; that he commenced manufacturing perfumery in June, 1852, and selling at wholesale and retail every kind of perfumery; that he has sold "a preparation of cocoanut oil," as "a preparation of hair oil" at different times since 1840. He called it "a preparation of cocoanut oil" and sold it to customers, but not by wholesale, until 1858, when he commenced selling it under the name "COCOÏNE," and with labels on the bottles, having that word impressed thereon.

No one can readily believe, that an enterprising manufacturer of, and dealer in perfumery, and who had been selling at wholesale and at retail since June, 1852, every kind of perfumery, had failed to observe the advertisements of "*Burnett's COCOAINE*" which were extensively published in the summer of 1857, in the City of New York, the defendant's place of business, in the Herald, Tribune, Times, Evening Post, Express, Sun, Harper's and Leslie's Weekly, as well as in other papers, or that he was ignorant of the existence in the market, of an article thus advertised, and sold in New York, by A. D. & C. Sands, Lazell, Marsh & Hand, Hegeman & Co., Barnes & Park, F. C. Nell & Co., Carey, Howard & Sanger, I or T. Maxwell, Schieffelin Brothers, and many others, and the sales of which had increased from 500 dozen bottles in the six months commencing July 1, 1857, to 1,500 dozen in the second six months, and in the next six months to 300 dozen more.

Even if he had denied on oath that he had heard of the article; or, if having heard of it, that he was aware that this article of the plaintiffs' manufacture was, or had become known to the public, by the word "COCOÏNE," it would require some credulity to credit it. But he makes no such denial, and there is no evidence opposed to deducing such inferences as would be naturally drawn from the testimony to which I have referred.

But this is not all. The defendants, according to their

Burnett *et al* v. Phalon.

own testimony, had been selling, since 1840, substantially the same article as they, in 1858, denominated *Cocoïne*; and had been selling it as "*A preparation of cocoanut oil.*" Why, after transacting this item of their business, in this manner, for some eighteen years, do they resort to the means employed in 1858 to bring it before the public under the designation of "*Cocoïne*"? The answer is found in the reputation, and extensive and largely increasing sales of *Cocaine*.

And there cannot reasonably be assigned any other motive than the one stated in the fifth finding of facts.

The fact that Leopold Simon, (the defendants' chemist, who entered into their employment about the first of March, 1858, and who, prior to that time, had followed the business of a chemist in Paris,) had never heard of the word *Cocaine* until after he "composed" the name *Cocoïne*, does not, in my view, tend to show the absence of a fraudulent intent in the defendants.

The defendants had been "frequently experimenting "with cocoanut oil, and selling" it since 1840, and selling it as a preparation of hair oil. It was a simple matter to get up a label, and impress on it, and on the bottles containing their compound, the word "*Cocaine*," omitting one letter only. But no plausible or rational explanation, except an intent to defraud, could be given of a transaction as bold as that would be. It was, undoubtedly, deemed wiser to instruct the chemist to compose a name, somewhat indicative of the substantial ingredient of the compound, without informing him of the fact that Burnett was manufacturing and selling largely a similar article, which was known as "*COCOAINE.*"

The reputation of the defendants may, justly, be assumed to be extended, creditable and valuable. They had used it, and had experienced all the benefit that eighteen years' employment of it, in connection with their preparation and sale of cocoanut hair oil, could give to their compound.

Burnett, by great outlay and effort, had succeeded in creating an extensive demand for his own manufacture,

known as "COCOINE." The defendants, in 1858, with the intent and for the purpose stated in the fifth finding of facts, impressed on the bottles and labels containing and covering their compound the close imitation, "*Cocoïne*."

It seems to me, therefore, that the judgment cannot be reversed on the ground that this finding is contrary to evidence.

That the plaintiffs are entitled to the relief of an injunction against such a use of their trade-mark, on the facts found, I do not understand to be disputed. The cases cited, on the points of either counsel, establish that they are. (See Upton's Trade-Marks, 180-185.)

That the plaintiffs recovered only nominal damages, considering the circumstances under which they were so assessed, I regard as of but little moment.

I think the judgment should be affirmed.

MONCRIEF, Justice, concurred in this opinion.

ROBERTSON, J., (*dissenting*.) The principle adopted by the learned Judge at Special Term, in deciding this case, was one of which I had occasion to approve in the case of *Corwin v. Daly*, recently decided in this Court, (7 Bosw., 222,) and is fully sustained by all the cases. It is that a manufacturer of, or dealer in, any article, has a right to designate them as being made or sold by him, by a mark, or device, formed of a combination of letters, (such as *Cocaine*,) not constituting a word in any language, and that no other person has a right to use the same mark, or device, by an immaterial change, such as omitting a single letter, (as in *Cocoïne*,) so as to induce the unwary public to believe that the articles made or sold by the counterfeiters are the same as those of the original inventor of the mark.

If, however, it should appear, as is contended in this case on the part of the defendants, that the device used by them to indicate their manufactures, is a word either actually in use to express the nature, component parts, quality, or use of the article, or capable of being formed, according to the analogy of language, from other words, as

Burnett *et al.* v. Phalon.

a different part of speech, (such as *Cocoïne*.) and the plaintiffs have only adopted the same word, inserting a letter therein, in inventing his mark, so as to deprive it of its character as a word, the question would arise whether the defendant could be deprived of the right to use the combination of letters forming such word because it might resemble the device so adopted. The only remaining questions, therefore, in this case, are questions of fact, whether the term *Cocoïne*, with the diæresis over the "i," was a word in the French language, indicating the nature, ingredients, quality, or use of the liquid compound made by the defendants, and, if not, whether the defendants used such word, or combination of letters, to mislead the public and make them believe that the commodities sold by them were the same as those sold by the plaintiffs.

It is somewhat remarkable, in this case, that the result of the report of the Referee, is that the plaintiffs have sustained no damage, and the defendants made no profits, hitherto, by their invasion of the plaintiffs' mark, and, to that extent, the basis of any equitable jurisdiction is taken away. I had occasion, in the case already adverted to, to trace the origin of the doctrine of trade-marks to the common liability of every one who palmed off upon the public his commodities as those of another man, to the deceived customer, and, indirectly, the supplanted competitor. Equity seized on jurisdiction to prevent repetitions of the wrong, and, with its customary eagerness to amplify such jurisdiction and model the relief granted by it to every phase of such wrong, created the doctrine of what are called trade-marks. In doing so it has nearly established a common law copyright, of perpetual duration, permitting an injunction without a trial at law, calling upon the defendant for an account of his profits, and even attempting to reach what are claimed to be instruments prepared for future fraud. This may be a very healthful jurisdiction, but, without great care, its searching character may be made an instrument of wrong. Much is said of the injustice of allowing one man to avail himself of the skill and

Burnett *et al.* v. Phalon.

expenditure of another by false representations, which is well founded; but where, instead of using the name of the owner, or vendor, strange devices and insignia are employed to indicate such ownership, or source, which do so but ambiguously, and require considerable familiarity and experience with them to connect them therewith, no great sympathy is created for those using such devices. Were they the subjects of copyright, or other modes of warning mankind against trespassing on a settled right, there would be greater justice in punishing the trespasser; but the most innocent may be caught unwarily in a litigation where a word is employed as a device, originating, in some measure, from the materials used in forming a composition, as in this case, where one of the plaintiffs admits that he framed *Cocoaine* as a word, and that it was suggested by the cocoanut oil employed in the manufacture of the article, while the discoverer of the word *Cocoïne* claims that it is a word, framed according to the genius of the French language, to express the extract of that oil.

The learned Judge who refused a new trial in this case upon the newly discovered evidence, was undoubtedly correct in considering such evidence as merely cumulative, if the fact that *Cocoïne* was a word known and in use before the adoption of the word *Cocoaine* by the plaintiffs, was a subject of conflicting evidence before the Court at Special Term, and material, on the original trial of the issues in this action. But, in reality, there was no conflicting evidence, and either the testimony on the first trial failed to make out the prior or proper use of *Cocoïne*, as indicating something connected with cocoanut oil, or the learned Judge on such trial must have held that such use and connection was immaterial, and that no one had a right to use any word as a device for his commodities which resembled a combination of letters which formed no word, adopted by another, if he did it with intent to have them mistaken for each other; and that there was evidence of such intent in this case. That learned Judge, who does not agree with

Burnett et al. v. Phalen.

the plaintiffs in the view that *Cocaine* is a word, but holds it to be merely a combination of letters, has not, either in his findings of fact or opinion, passed upon the question whether, upon the evidence, *Cocaine* was a word in the French language, but places his decision purely upon the ground that, after the plaintiffs had adopted *Cocaine*, which was no word, the defendants could not employ the word *Cocaine*, even if it was a word, because it so nearly resembled the former as to be mistaken for it; and although we have a right to supply, as a fact found, that *Cocaine* was not a known word when the plaintiffs adopted *Cocaine*, if necessary to sustain the judgment, and the testimony warrants it, I think in this case the testimony of Simon, which was uncontradicted, does not warrant it. A word composed of the letters C-o-o-o-i-n-e was found in a scientific French dictionary, but with an accent over the final "e," which renders the pronunciation different from what it would be without it. That word was, however, an adjective, and meant that which had the form of a coconut tree. In that form it was a botanical word. But the French language, as appeared, admits also of the formation of words to express a chemical result, and the termination "ine," added to the name of a substance, expresses the finest part or essence of it when reached by a chemical experiment and discovery, and there were two hundred words, with such termination, meaning extracts. The witness testified that by such rule *Cocaine* is a proper term in chemistry, and would mean the finest part of the coconut oil. Such testimony seems satisfactory to show that the term *Cocaine* could be very well adopted to signify an extract of coconut oil, and would be recognized as a French word expressing it by all who understood the French language and the rules of forming words in it. The question, therefore, comes back to the same point—whether the plaintiffs, by adopting the letters C-o-o-o-a-i-n-e in the order in which they did, precluded all the world from using the word *Cocaine* to designate an extract of coconut oil, if

Burnett et al. v. Phalon.

the intent were thereby to sell the commodity to which it was attached as the plaintiffs', and such were the result.

It is plain that the plaintiffs could not prevent the honest application by the public of the term *Cocoïne* to an extract of cocoanut oil, or anything of which it was the principal ingredient, or the sale of such commodity by that name. The question therefore arises whether the defendants could anticipate the innocent application of such name to such commodity by the public, and employ it with intent to divert the plaintiffs' custom. After such name became honestly public property, and publicly known, the plaintiffs would certainly no longer rely upon a word so near it as *Cocaine* to protect themselves against the danger of confusion of the two articles; but until some honest motive made the application proper, they had a right to rely on protection against the dishonest adoption of the term merely to injure them.

I am, however, by no means satisfied that the evidence in this case warranted the finding that the defendants adopted the term *Cocoïne* with intent to have the public believe that it was the same article as the plaintiffs'. The cause of reasoning by which the learned Judge, before whom the issues were tried, arrived at that conclusion, was simply this: that the plaintiffs had advertised extensively their adoption of the term *Cocaine*; that the defendant must have known such advertisements, because he did not deny knowledge of them on his examination as a witness; and that, knowing them, his adoption of a word so nearly alike must be held to be in bad faith. The chemist employed by the defendants swears that, being employed by the latter, he invented the name spontaneously; that he consulted many authorities before he did so, and had not heard of *Cocaine* as the plaintiffs' trade-mark, and his testimony is uncontradicted. It was the business of the plaintiffs to make out bad faith affirmatively. Nothing can be inferred from a party, when on the stand as a witness, not volunteering to deny knowledge of a notice. It was the duty of the plaintiffs to have brought such know-

ledge home to him in some way. I do not think that the testimony bears out the inference of the learned Judge, that the plaintiffs had for nearly two years advertised their mixture in nearly every paper in New York. One of them testified merely that he advertised in some of the principal or leading papers; this being the only advertising, it was not *prima facie* evidence that the defendants had seen such notices, as it can hardly be presumed that every man reads all the newspapers. Without this presumption of knowledge by the defendants of the advertisements, there is no evidence to sustain bad faith on their part, and the evidence of one witness tends to show good faith.

For this reason alone I think there ought to be a new trial, as the question of good faith is vital to the plaintiffs' right to interfere, particularly in a case of this kind where the word used by the defendants was appropriate to the article sold, was formed by a French chemist according to the analogies of the French language, and without knowledge of the plaintiffs' trade-mark.

There appears, besides, to be an addition to the use of the word Cocaine in the defendants' labels, besides the diæresis over the "i," which should protect them either altogether or else in some degree from the charge of bad faith; the labels exhibited, and it is so charged in the complaint, have the name of the defendants' firm prefixed to that title, thus showing the origin of the article sold, and this, in several cases, cited in *Corwin v. Daly*, (*ubi supra*,) has been held sufficient, unless some device is used to prevent its being noticed by the public. The value of such an addition in notifying the public as to the real manufacturer of the article sold, can be better determined on a new trial, by inspection. No notice seems to have been taken of it on the former one.

The judgment should therefore be reversed, and a new trial had, with costs, to abide the event.

Judgment affirmed.

Chamberlain v. Dempsey.

MOSES CHAMBERLAIN, Plaintiff and Respondent, v. JANE R. DEMPSEY (who was impleaded with William D. Salisbury *et al.*), Defendant and Appellant.

1. Where an action is tried before the Court without a Jury, the only authority for entering judgment is the decision of the Judge who tried the cause. A reference to compute the amount of the recovery, if not authorized by the decision, is irregular.
2. Where, on a trial by the Court without a Jury, of an action for the foreclosure of a mortgage, the Judge omits to determine the amount due to the plaintiff, or to direct that there be a reference to ascertain it, and a reference for that purpose is ordered on an application to another Judge, a judgment entered on the report of the Referee so appointed is not only irregular, but erroneous; there is virtually a mistrial, and, on appeal from the judgment, it will be reversed.
3. The contracting party, in an action at law upon a mortgage of real estate, or, in an equitable action to foreclose the mortgage, a defendant who is the owner of the property, or has a valid lien upon it by mortgage or execution, is entitled to interpose the defense of usury as a matter of strict right.
4. In a foreclosure suit, where the defense of usury is interposed by a grantee of the mortgagor, an admission at the trial, and the finding by the Court as a fact, that such grantee is the owner in fee of the premises, imports that the conveyance by which the grantee acquired title, was in hostility to the mortgage, and such a grantee may allege and prove by way of defense, that the mortgage is usurious.

(Before BOSWORTH, Ch. J., and MONCRIEF and ROBERTSON, J. J.)

Heard, February 11, 1862; decided, March 15, 1862.

THIS action was brought for the foreclosure of a mortgage on real property, given by the defendant William D. Salisbury to the plaintiff, to secure payment of a joint indebtedness of Salisbury and the defendant Arrowsmith. Besides these defendants, Jane Dempsey, Isaac C. Delaplaine, George W. Platt and twenty-two other persons were made defendants, upon the usual allegation that they had or claimed some interest or lien which was subsequent to the mortgage.

The defendant Jane R. Dempsey, put in an answer which stated "that she is the owner in fee of the premises," &c., and proceeded to set up usury in the debt to secure which the mortgage was given; and also stated other defenses not material to the present decision. The defend-

Chamberlain v. Dempsey.

ants, Platt and Delaplaine also answered, each claiming to be prior incumbrancers.

The defendants Salisbury and Arrowsmith had put in an answer, but withdrew it, upon the plaintiff's stipulating that he released all personal claim against them, and that no personal judgment should be taken against them.

The action came on for trial at a Special Term of the Court, before Mr. Justice HOFFMAN, on the 11th day of October, 1861.

After the counsel for the plaintiff rested his case, the counsel for the defendant offered to prove, (the defendant, Dempsey, being admitted to be the owner of the mortgaged premises,) that the indebtedness mentioned in the complaint was usurious, as set forth in the answer of the defendant, Dempsey.

The counsel for the plaintiff objected, and the Court excluded the evidence, to which ruling the counsel for the defendant excepted.

The Court reserved its decision, and after consideration, directed judgment for the plaintiff, and among the findings of fact and conclusions of law, stated, as matter of fact, that the defendant, Dempsey, was, at the time of filing her answer, and still was, the owner of the premises.

The Judge stated, in the opinion which he delivered, that he decided the point as to usury upon the controlling authority of *Sands v. Church*, (2 Seld., 347.)

The facts as to the regularity of the reference and final judgment, are stated in the opinions. From that judgment the defendant, Dempsey, took the present appeal.

George E. Thompson, for the appellant.

I. It is well settled that if a borrower, at a usurious rate, made an unqualified sale of property pledged to secure the usurious loan, the purchaser may plead the statute; and the purchaser of land may show usury in a mortgage existing at the time of his purchase, to defeat a foreclosure. (*Post v. Dart*, 8 Paige, 639; *Shufelt v. Shufelt*, 9 Id., 137;

Chamberlain v. Dempsey.

Vroom v. Ditmas, 4 Id., 526; *De Wolf v. Johnson*, 10 Wheat., 393; *Lloyd v. Scott*, 4 Pet., 205; *Berry v. Thompson*, 17 Johns., 436; *Green v. Kemp*, 13 Mass. R., 515; *Trumbo v. Blizzard*, 6 Gill. & Johns., 18; *Blydenburgh on Usury*, 106-108.)

II. The case of *Sands v. Church*, (6 N. Y. R., 347,) does not conflict with this principle. There the mortgagor sold subject to the mortgage, which does not appear in the case at bar.

III. The admission made at the trial, that "the defendant is owner of the mortgaged premises," means that she is the owner in fee.

Wm. M. Allen, for the respondent.

I. The mere allegation of ownership in fee, without any proof as to the circumstances under which the defendant acquired such ownership, notwithstanding the admission at the trial, will not entitle the defendant to prove usury. That admission means that she is the owner subject to the mortgage. (*Sands v. Church*, 6 N. Y. R., 347; *De Wolf v. Johnson*, 10 Wheat., 393, and cases cited.)

II. No one but a party to the contract can avoid it on the ground of usury. (*Post v. Bank of Utica*, 7 Hill, 391, 406; *Green v. Morse*, 4 Barb., 332.)

BOSWORTH, Ch. J. The defendant Dempsey alone appeals from the judgment. In her answer she expressly admits the "execution of the notes and mortgage" described in the complaint. Taking her answer to be true, she admits the notes to be unpaid.

There is therefore sufficient evidence to sustain the findings of fact as to the making and delivery of the notes, and the making and delivery of the mortgage, and the non-payment of the notes at maturity.

The decision of the Judge is dated November 30, 1861, and contains his findings of fact and conclusions of law. The latter are two in number: First, "that the plaintiff is entitled to judgment of foreclosure and sale of such mortgaged premises, for the purpose of discharging the amount

of principal and interest due upon such mortgage, together with costs of suit;" and second, "that the plaintiff is not entitled to a judgment for any deficiency which may appear upon the sale of such mortgaged premises." The defendant excepts to the first conclusion of law only.

The record does not show that any judgment has been rendered on this decision. The Code does not contain any authority to enter a judgment otherwise than upon and according to the decision. (Code, § 267.) The cause was tried before Judge HOFFMAN, without a Jury. If he intended a reference to compute the amount due on the notes, it should have been directed as a part of his decision.

But the record states that on the 26th of November, 1861 (four days prior to Judge HOFFMAN's decision), Judge MONCRIEF made an order of reference to compute the amount due. The Referee's report, under this order of reference, is dated November 27, 1861. The minutes of the proceedings before the Referee form part of the case, and show that these proceedings were commenced before him on the 26th of November. They also purport to state which of the parties appeared before him. Mrs. Dempsey is not one of them. She could not have had notice of them for the full time required by established practice. The judgment entered bears date the 7th of December, and is ordered by Mr. Justice WHITE, and not only does not, in its recitals, contain any direct allusion to the trial before Judge HOFFMAN, but purports to be made on proof of personal service of the summons on all the defendants, the aforesaid order of reference, and the report of said Referee.

There could be no authorized judgment except one entered upon the decision of the Judge who tried the cause; that decision is the authority for it, and there can be no other. If that had directed a reference to compute the amount due, the report of a Referee ascertaining it would determine that question on becoming absolute. But it would not of itself constitute any authority to enter a judgment of foreclosure and sale. At most, it would

Chamberlain v. Dempsey.

determine the amount the plaintiff was to be paid out of the proceeds of a sale made by virtue of a judgment entered on Judge HOFFMAN's decision.

I regard all these proceedings as irregular and unauthorized. The defendant, Dempsey, should have moved to set them aside as irregular, if she did not assent to them. Instead of that, she appeals in terms from the judgment "entered herein on the 7th of December, 1861." That judgment recites the order of reference, and the order of reference recites that "the issue joined by the answer of said Dempsey having been disposed of, and the facts set up in the answers of Delaplaine and Platt being admitted by plaintiff," &c.

The decision of the Judge who tried the cause does not dispose of the issues made by the answers of Delaplaine and Platt, by anything contained in the terms of the findings of fact. If they are incumbrancers prior to the plaintiff, the Judge who tried the cause should have so found, and directed a sale subject to their mortgages; or that they be first paid.

That another Judge has power, at another or the same term of the Court, to make a decision declaring the priority of the liens of the parties to the action, differently from the decision of the Judge who tried the cause, no one will pretend. And if the Judge who tried the action, has not in terms, or by necessary implication, decided the question, then there is a mistrial.

The decision, that the plaintiff is entitled to a judgment of foreclosure and sale, for the purpose of discharging the amount due on his mortgage, together with costs, imports a finding, that the liens or interests of all the defendants, accrued subsequently to the plaintiff's mortgage. The complaint avers that such is the fact.

The judgment entered on the order of Justice WHITE, conflicts in this respect with the import of the decision of Justice HOFFMAN.

But, if my brethren shall be of the opinion that these questions in regard to the regularity of the proceedings

can be raised only by a motion to vacate them, and not by appeal, that the fact that the defendant Dempsey has not even on this appeal raised any question of regularity, is satisfactory evidence that she had notice of the application for the order of reference, and assented to it, and admitted service of notice of hearing before the Referee, and had notice of the settlement of the judgment by Justice WHITE, and that such judgment, in the intent of the parties, is entered as well on the decision of Judge HOFFMAN as upon the subsequent proceedings, then nothing will be left except the defendant's exception to the decision, excluding evidence "that the promissory notes mentioned in the complaint were usurious, as set forth in the answer of the defendant, Dempsey," and her exception to the first conclusion of law contained in the decision of Judge HOFFMAN.

With reference to the first exception, it is to be observed that the only foundation laid for giving the evidence which the Judge excluded, is first, the allegation in Dempsey's answer "that she is the owner in fee of the premises" in question, and the admission at the trial, to wit, "the defendant, Dempsey, being admitted to be the owner of the mortgaged premises." What this admission was understood by Judge HOFFMAN to mean, is shown, to some extent, by the seventh finding of fact, viz.: "That at the time of filing such answer, the defendant, Jane B. Dempsey was, and now is the owner of such premises." When or how she became such owner is not alleged in the answer, nor stated in the admission, or in the findings of fact. But it is quite evident, that her ownership accrued subsequent to the giving of the mortgage held by the plaintiff, and is subordinate to it, except in so far as the fact of usury exempts it from such subordination. The answer does not deny that Mrs. Dempsey's ownership was acquired with actual knowledge of the plaintiff's mortgage, nor does it affirm that it is created by a deed containing any covenants of warranty.

Unless it be law that a Court of Equity, on a given

Chamberlain v. Dempsey.

state of facts, will permit proof of usury as a defense and flat bar, when it could not grant any relief to the same party, on a bill filed by him, to obtain relief from the same usurious transaction, (a question which will be considered hereafter;) then, it seems to me, that *Post v. The President of the Bank of Utica*, (7 Hill, 391,) is an authority in support of the decision at Special Term. The respondents, the Bank of Utica, had become owners of the mortgaged premises by a purchase of them at a Sheriff's sale, on a judgment and execution against the mortgagor. They, thereby, acquired all the title which any deed from the mortgagor could have conferred. Whether a conveyance by the mortgagor, with a warrantee of title, (*Cole v. Savage*, 10 Paige, 583-592,) would confer rights to contest the mortgage, which a quit-claim deed, or a purchase "of the mere equity of redemption" would not confer, may, possibly, be a material question. But it is quite clear that in *Post v. The Bank of Utica*, the decision of the Chancellor was reversed, and his decision in *Cole v. Savage*, (*supra*,) was disapproved.

In *Green v. Kemp*, (13 Mass. R., 515,) the defense of usury was excluded. The defendant was the mortgagor's grantee of "all the right in equity of redeeming, which he (the mortgagor) had in the premises." In *Sands v. Church*, (2 Seld., 347,) the defense was excluded, on the ground that the defense of usury had been waived, by those having a right to waive it, before the title of Daily, one of the appellants, had accrued; Church, the other appellant, was one of the parties waiving it.

Hence, unless the admission made at the trial, that the defendant Dempsey "is the owner of the premises" in question, imports more than that she has succeeded to the title, which the mortgagor had, subject to the mortgage, then it does not appear that she has any conveyance given in hostility to the mortgage. It, of course, does not mean that she has a title free from all incumbrances. It could not have been understood by Dempsey, the plaintiff, or

the Court, as admitting that her title was paramount to that of Platt and Delaplaine, as mortgagees.

In my view the important question upon the merits is resolved into the consideration whether the fact as admitted, or found, in regard to Dempsey's ownership, imports that her title is in hostility to the mortgage? If it imports that, then I think the decision erroneous; otherwise, not.

A party sued at law on a usurious security, if able to prove usury, succeeds in his defense. The contract and securities being declared void by statute, it would seem to follow that whether the action was at law, upon the contract, or in equity, to enforce the security, the contracting party, in the former, or, in the latter case, the party owning the encumbered property, or having a valid lien upon it, by mortgage or execution, is entitled to the defense as a matter of strict right, if possessed of evidence to establish it. In this view, the decisions do not present the actual conflict imputed to them. *Jackson v. Dominick*, (14 J. R., 435,) *Dix v. Van Wyck*, (2 Hill, 522,) and *Post v. Dart*, (8 Paige, 639,) are not in conflict with *Post v. The Bank of Utica*, (7 Hill, 391.) Prior to the Revised Statutes, if a borrower was obliged to resort to a Court of Chancery to obtain a discovery of evidence to establish the usury, he was obliged to offer to pay the sum lent, and interest, and could only obtain relief from the usurious excess. Those statutes did not relieve him from the necessity of offering to pay the principal. (*Livingston v. Harris*, 11 Wend., 329.) In *Post v. The Bank of Utica*, (7 Hill, 391,) the question was whether the respondent was one of the persons authorized by statute to seek relief by bill in equity.

Holding that he was not, does not necessarily decide that if a party defendant, and able to prove the usury, he might not allege and prove it as a defense, although not within the statute specially authorizing a bill for relief. In this view there is no necessary conflict between *Post v. Dart*, (8 Paige, 639,) and *Post v. The Bank of Utica*, (7

Chamberlain v. Dempsey.

Hill, 391.) In the former case, the usury was set up as a defense, and the party had a strict legal right to allege and prove it.

In the latter case, the respondent sought relief in equity under a particular statute, and he was held not to be within its provisions. Such a view does not involve the consequence which a learned Senator in the latter case, (7 Hill, 413,) denounced as "discreditable to the law," that "the success of the lender, in recovering the money loaned, would depend upon the Court in which the litigation was carried on, rather than upon the law of the land;" for in this view, usury as a defense is equally available, as a matter of strict right, in equity as at law. It is only when the borrower, or his grantee of mortgaged premises, goes into a Court of Equity for affirmative relief as a plaintiff, that the question arises whether the latter is one of the persons authorized to file a bill.

On the whole, my mind is led to the conclusion, that the effect of the admission made at the trial is, that the defendant, Dempsey, has all the ownership and right which the mortgagor was competent to grant. He could convey, subject to the mortgage, and thus waive the usury, and withhold from his grantee all right to avail herself of it. But he could also convey in hostility to it, in which case she could plead and prove it. By the terms of the admission made, it must be intended to mean, that Dempsey's ownership is as perfect and absolute as it was competent for the grantor to make it, and in this view the decision of the Judge is erroneous, and the judgment should be reversed and a new trial granted.

When the defendant is put to proof of her title, all the doubts which now beset this branch of the case, may be removed.

The judgment should be reversed and a new trial granted, with costs to abide the event.

ROBERTSON, J. I entirely concur with the Chief Justice in the view that the admission of an ownership in fee,

In Mrs. Dempsey, without any qualification, gave her the same right to set up the defense of usury against the mortgage sought to be foreclosed, as was in her grantor.

The proceedings in the cause seem to be quite irregular. The trial of the issues of fact, in the cause, took place before one Justice of the Court, who decided on the pleadings and evidence, "That the plaintiff was entitled to judgment of foreclosure and sale" of the premises, to pay the amount due on the mortgage, but was "not entitled to a judgment for any deficiency." This decision being in writing, was filed, but no judgment was entered upon it. (Code, § 267.) A judgment was, however, entered upon the order of a different Justice, which does not refer to the first trial of the issues, but is made merely upon proof of service of the summons personally on all the parties, and the report of a Referee, made before the decision upon the first trial, and under a previous order by still a third Justice, to compute the amount due on the mortgage. Such order, on its face, seems to have been made without notice of the application for it to, or appearance at the making of it, by the defendant, Mrs. Dempsey, and the Referee's report does not recite her as appearing.

As these proceedings stand, the plaintiff first obtained a computation of the amount due against the defendants, then tried the action and obtained a decision against her on questions of law, but without any order of reference to compute the amount due as against her, and finally entered a judgment against her, for a sale, to discharge the amount reported due by the Referee against others.

The power of a Court to order a reference is found in the 271st section of the Code, which, in its second subdivision, provides that it may be done, either before judgment or afterwards, for carrying the judgment or order into effect, where the taking of an account shall be necessary for the information of the Court. It is very plain in this case that the order of reference actually made was as void as against Mr. Dempsey as though damages were assessed in an action for assault and battery before the issues were tried,

Chamberlain v. Dempsey.

since the plaintiff proceeded to try the issues as against her afterwards. I do not see how, under the decision of *Lawrence v. Farmers' Loan and Trust Co.*, (15 How., 57,) any judgment could have been rendered on the decision at the trial at all, because there was no order of reference directed by it to compute, as, even with that, there could be no judgment, until the computation was made and all questions upon it disposed of. Section 280 of the Code provides that "the judgment" shall be entered in the judgment book, and shall specify clearly the relief granted or other determination of the action. Until every thing is done required by the decision of a single Judge, to furnish materials for a judgment, any entry upon such decision must be a mere order. The act, therefore, of the Justice who made the final order for judgment was not a mere formal matter, but was the giving of judgment upon the decision of the Judge who tried the cause, and a report of a Referee not made upon an order included in the decision on the trial.

As the appeal is from the judgment, I think this was not only an irregularity but an error. It would be an irregularity in so far as it was made without the presence of, or notice to the attorney of Mrs. Dempsey. But it is error to pronounce judgment, upon an incomplete decision, upon a trial without any evidence of the amount due, and upon a report which, as to Mrs. Dempsey, was an absolute nullity.

Even if it were possible that the order of reference to compute had been made after the trial, I do not think the matter would be mended. I do not see how any Judge, but the one who tried the issues, could issue an order for computation. He was bound to furnish all the means of determining the relief to be granted, by his decision, otherwise it would be impossible to ascertain how far the making of such an order would have modified his decision.

I think the practice of ordering a computation after the decision of a case ought not to be encouraged, and, indeed, it may be very doubtful if it can be done, unless an account

Chamberlain v. Dempsey.

is to be taken ; a mere computation might as well be made at the trial as after.

I think, therefore, the decision of the Judge who tried the action was too incomplete to allow a judgment to be entered upon it, by himself or any other Judge ; that no order of reference to compute the amount due could therefore be made as regarded Mrs. Dempsey, before or after such trial, by any other Judge ; that the judgment was entered without a trial and decision that would warrant it ; and that the judgment should be reversed as regards Mrs. Dempsey.

Whether the decision of the Judge who tried the cause can now be amended, so as to add to it an order to compute, and a new judgment be entered therein, is not a matter now to be decided. But I think if that can be done, and the amendment be considered as made, then the error on the trial, as to the merits before referred to, is sufficient to reverse the judgment.

The judgment should therefore be reversed, and a new trial granted, the costs to abide the event.

MONCRIEF, J. The defendant, Jane R. Dempsey, alleged in her answer as a defense to the action, that she was the owner in fee of the mortgaged premises, and that the note, to secure the payment of which the mortgage was executed and delivered to the plaintiff, was usurious. This, if proven, was a good defense. (*Green v. Kemp*, 13 Mass. R., 515.) *Dix v. Van Wyck*, (2 Hill, 526,) cites this case, and states that it was admitted that if Kemp had purchased the land and not the *equity of redeeming*, though with notice of the mortgage he might have set up the usury. Kemp was not permitted to set up usury in the mortgage, for the reason that he had no *title* to the land.

- In 7 Hill, 406, (on appeal from 8 Paige, Ch. R., 640,) the question discussed is whether a purchaser at a Sheriff's sale, under an execution, is a "*borrower*," within the meaning of the statute, and it is held he is not.

Scott v. Lillenthal.

Sands v. Church, (2 Seld., 447,) affirmed the judgment below, on the ground that the appellants could not, on the facts presented in that case, avail themselves of the defense relied upon, and it appeared that the defendant (appellant) purchased subject to the mortgage. He was, therefore, the owner of the equity of redemption only. (*Belmont v. Coman*, 22 N. Y. R., 438.) *De Wolf v. Johnson*, (10 Wheaton, 393,) presents the case of a third person, the assignee of an equity of redemption, setting up the defense. The learned Judge at Special Term erred in excluding the defense interposed by Mrs. Dempsey, it being admitted upon the trial that she was the owner of the premises; she had title, and could set up the usury.

The judgment should be reversed and a new trial ordered, with costs to abide the event. Judgment reversed.

JAMES SCOTT, Plaintiff and Respondent, v. CHRISTIAN LILLENTHAL, Defendant and Appellant.

1. In an action to recover compensation for services, alleged in the complaint to have been performed, upon a promise to pay therefor at an agreed rate of compensation, if the proof is that they were performed on a promise to pay what they were reasonably worth, the variance is immaterial, and the defendant not being misled thereby, the Court may allow an immediate amendment, without costs.
2. The testimony of a witness, that he is somewhat familiar with bookkeeping and accounting, and showing a somewhat intimate familiarity with the bookkeeper's services which are the subject of the action, establishes his competency to testify to the value of those services.
3. It is error to permit a witness who knows nothing of the services in question, except as instructed by the evidence he has heard at the trial, to testify what, upon the evidence, the services are worth.
4. Where, on request of defendant's counsel, the Court directed that all the evidence of certain witnesses relating to the value of services (and which evidence consisted of their opinions based on the testimony they had heard at the trial) should be subject to exceptions taken in the examination of preceding witnesses; but the exceptions thus referred to related solely to proof of the "ability of the plaintiff as a bookkeeper," or to the objection that such witnesses did not possess the special knowledge essen-

Scott v. Lilienthal.

tial to make their opinion admissible as evidence; *Held* that this was not equivalent to a specific objection that such latter witnesses did not know what were the particular services, of the value of which they were permitted to express an opinion; but it might be considered in deciding whether the exceptant should be allowed a new trial on terms.

5. Where it appeared that a verdict was rendered upon incompetent evidence necessarily calculated to affect the result, that there was much reason to suppose injustice had been done; and the defendant, though personally liable, was acting in a representative capacity, — *Held*, that although there was no sufficient exception to the incompetent evidence, a new trial should be granted on terms, unless plaintiff would stipulate to reduce the verdict.

(Before Bosworth, Ch. J., and Monroff and Robertson, J. J.)

Heard, February 13, 1862; decided, March 15, 1862.

THIS action was brought to recover for services which the plaintiff had rendered to the defendant, the executor, &c., of James Pollock as bookkeeper and accountant in the business of the testator's estate. The complaint alleged that the defendant, upon employing the plaintiff, agreed to pay him at the rate of one thousand dollars per annum, so long as the employment should continue. Before the trial, the plaintiff's attorney gave written notice to the defendant's attorney, that if, on the trial, he encountered any serious difficulty in proving a contract, fixing the rate of plaintiff's compensation, he should offer evidence to prove the value of the services rendered.

Upon the trial, the plaintiff moved to amend his complaint in this respect, to which the defendant's counsel objected, on the ground that a failure to prove the special contract was not a variance, but a failure of proof; and that this was not a case for the exercise of the power of amendment during trial.

The Court decided that the plaintiff should be permitted to amend his complaint, by adding a general allegation of the value of the services, and to give evidence of the value; to which the defendant's counsel duly excepted.

The portions of the testimony, material to an understanding of the questions determined, appear in the opinion of the Court.

Scott v. Lilienthal.

William Fullerton, for defendant, (appellant.)

I. The distinct denial in the answer of the special contract set up in the complaint, made it necessary for the plaintiff either to withdraw or prove his allegation; and having failed to do either, it is not a case of variance, but a failure of proof, and cannot be cured by amendment.

II. The amendment made at the trial cannot be sustained under § 167 of the Code.

The allegation added was not material to the case, because, where there is a special contract, value of the services need not be alleged.

Nor was it necessary to conform the complaint to the facts proved, because the only evidence in, at the time it was made, tended to sustain the complaint, and the original allegation was not changed.

No other subdivisions of the section are applicable.

III. If the complaint had been originally framed as it now stands, the plaintiff, on motion, would have been required to elect whether he should proceed on the special contract or on a *quantum meruit*. It is error to permit an amendment which has this effect.

IV. The whole of the testimony as to value of services should be stricken out, because it was not shown that the witnesses were acquainted with the usual compensation for such services, or in other words, the market value.

V. The verdict is against evidence.

VI. The damages are excessive.

Samuel J. Glassey, for plaintiff, (respondent.)

I. It is the duty of the Court to allow an amendment, unless it changes the nature of the action, and the original cause of action is left unproved in its whole scope and meaning. (Code, §§ 169, 170, 171.)

The amendment made in this case did not in any respect change the nature of the action.

It did not surprise, mislead or prejudice the defendant. The power of amending was properly exercised by the Court. (See *Catlin v. Gunter*, 10 How., 315, and 1 Kernan,

Scott v. Lillenthal.

368; *Hawkins v. Appleby*, 2 Sandf. S. O. R., 422; *Fort v. Gooding*, 9 Barb., 371; *Carter v. Hope*, 10 Barb., 180; *Fay v. Grimstead*, 10 Barb., 321; *Dauchy v. Tyler*, 15 How., 399; *Miller v. Garling*, 12 How., 203.)

It is in the discretion of the Court to grant or refuse an amendment, and its decision is not subject to review on appeal. (*N. Y. Marbled Iron Works v. Smith*, 4 Duer, 362.)

II. The ruling of the Court, allowing the witness, Robert M. Brown, to state what he considered the plaintiff's services to be worth, was correct. Opinions of witnesses are admissible and competent to prove the value of the services rendered or of things, provided the witnesses have a professional knowledge of the business to which the services relate, or a personal knowledge of the particular services or the particular thing in question. (See *Brill v. Flagler*, 23 Wend., 354; *Lamoure v. Caryl*, 4 Denio, 370; *Bearss v. Copley*, 10 N. Y. R., 93; *Pullman v. Corning*, 9 N. Y. R., 93.)

III. The verdict is fully sustained by the evidence.

BY THE COURT—BOSWORTH, Ch. J. This is an appeal by the defendant from an order denying a motion made by him for a new trial, and also from the judgment.

The exception to the decision allowing the complaint to be amended, is untenable. The fact that the defendant employed the plaintiff is admitted by the answer. The questions, how long the plaintiff was in the employment of the defendant, and whether he was employed at an agreed rate of compensation, were put at issue by the pleadings. The defendant averred in his answer that he never "made any agreement whatever in respect to compensation, except that implied by law." If he did not, the plaintiff was entitled to recover such sum as his services were reasonably worth. The amendment allowed consists of an allegation that they "were reasonably worth the sum of \$2,388.87, and the defendant ought to pay such sum therefor."

The variance between an allegation of an agreed price, and proof of a promise to pay what the services were

reasonably worth, is immaterial under section 169 of the Code; the defendant not alleging that he is misled thereby to his prejudice in maintaining his defense upon the merits. By § 170, the Court was authorized to order an immediate amendment without costs.

The exception to the decision allowing R. M. Brown to state what, in his judgment, the plaintiff's services were worth is not well taken. The evidence was objected to, "on the ground that the qualification of the witness to testify on the point has not been shown." The witness had testified thus: "I am somewhat familiar with bookkeeping and accounting; I understand bookkeeping tolerably well." He had also testified to a somewhat intimate knowledge of what the plaintiff had done. This evidence established his competency to testify. The value of his opinion was a question for the Jury. If it be admitted that his subsequent testimony tends to show him less qualified to testify on the point, than his direct testimony, still the accuracy of the decision is not thereby affected. That is to be tested by considering the testimony that had been given at the time the decision was made, and not by testimony given subsequently.

Testimony was given by A. B. Stewart, G. M. Seymour and David Rait, which I consider clearly incompetent. Whether the case shows that an objection and exception were taken to its admission, and if not, whether a new trial should be granted on terms, will be considered. Stewart, in his testimony as to the value of the plaintiff's services, says: "I have heard the testimony as to these services, * * should think the work worth all the plaintiff claims, * * I have not looked at the books, I speak from the evidence I have heard here." A witness, in thus testifying, is drawing inferences and conclusions which fall within the exclusive province of a Jury, and such evidence is clearly incompetent. (*Clark v. Baird*, 5 Seld., 183, and cases there cited; *Page v. Hazard*, 5 Hill, 603; *Lamoure v. Caryl*, 4 Denio, 370; *Harris v. The Panama R. R. Co.*, 3 Bosw., 7.) A witness, in order to be

permitted to give his opinion of the value of any subject, as an item of evidence, must be personally acquainted with it, and possess a knowledge in respect to the value of it, which it cannot be presumed is possessed by people generally; or if, though possessing that knowledge, he is not personally acquainted with the subject, the particulars of it, which, it is assumed, a Jury may, upon the evidence, find to exist, must be stated by way of hypothesis, and the opinion be confined to the hypothetical case stated. Where, as in this case, the value of the plaintiff's services is to be determined, and that value depends upon the time occupied and the amount of labor performed, and any question arises upon the evidence, in regard to the extent of the services, it is for the Jury alone to determine what was done. By permitting a witness, who knows nothing of the services, except as instructed by the evidence, to testify what, upon the evidence, the services are worth, it is left to him first to determine questions of fact, and then give an opinion based upon the facts as he may have determined them. And a Jury, in following his opinion of value, may give a verdict for services, which, in their view of the evidence, have not been performed.

G. M. Seymour and David Rait, severally gave testimony as to the value of the plaintiff's services, based upon "the testimony as to the work done by Mr. Scott."

To determine whether this evidence must be deemed to have been admitted against the objection and exception of the defendant, it is necessary to recur to the testimony of George Miln and other witnesses, and to the exceptions taken on their examination. Miln stated that the plaintiff had "served him as a bookkeeper four or five years."

He was then asked this question, viz.: "Do you know, and if so, state his ability as a bookkeeper? The defendant's counsel objects to the evidence as incompetent and irrelevant. The objection is overruled, and the defendant's counsel excepts." The answer of the witness is given, and the case then states that "the defendant's counsel here asked the Court to consider all the evidence,

Scott v. Lillienthal.

"relating to this branch of the case, as subject to the exceptions taken in the examination of the preceding witnesses, and the Court so ordered." Then follows the testimony of Stewart, Seymour and Rait. The exception taken in the testimony of Miln, was to evidence of the plaintiff's "ability as a bookkeeper." That taken in the testimony of Brown, was that he had not been proved to possess the qualification essential to entitle him to testify "on the point," "what were the services of Mr. Scott, (the plaintiff,) worth." In the testimony of the plaintiff, objection was made to any evidence as to what his services were worth, "on the ground that the plaintiff was held to the special contract set up in the complaint."

Neither Stewart, Seymour, nor Rait, was asked if he knew the ability of the plaintiff as a bookkeeper. They were examined as to the value of his services. The only exceptions taken in the testimony of other witnesses, which can have any application to theirs, relate to proof of the fact of the value of his services, unless indeed they relate to the qualification of these persons to speak to the question of value. But they severally testified that they understood the business of bookkeeping, and had acted in that capacity.

I think, therefore, that the agreement between defendant's counsel and the Court cannot operate with like effect as a specific objection to the testimony now under consideration, and a decision of the Judge admitting it, and an exception by the defendant to the decision.

But perhaps it should not be overlooked, in deciding the question, whether the defendant should have a new trial, on terms. He may, perhaps, be regarded as having done what, at the time, was considered sufficient to enable him to get relief, if improper testimony was received on the question of the value of the plaintiff's services.

The plaintiff and Mr. Brown (excluding the testimony of Stewart, Seymour and Rait) are the only witnesses on behalf of the plaintiff who speak to the value of his ser-

Scott v. Lillenthal.

vices, except S. B. White, who testifies that "Mr. Scott is a very competent bookkeeper, and receives \$1,000 a year."

The Jury have allowed him at the rate of \$1,000 a year from the 11th of December, 1857, to May 1, 1860. In his verified complaint he states an agreement to pay him at and after the rate of \$1,000 per annum. It is clear that from the 1st of February, 1859, to the 1st of May, 1860, he had regular and fixed occupation: first, as Secretary of the N. Y. & Tennessee Zinc Company; and next, as bookkeeper and discount clerk in the Grocers' Bank. From the 19th of June, 1859, to the 1st of May, 1860, he was in the Grocers' Bank from 9½ A. M. to between 3 and 4 P. M., and received \$1,000 a year. In the Zinc Company he was occupied about an equal part of his time. He did, during this latter period, relatively but little for the defendant, as compared with his services prior to February 1, 1859.

The testimony of the plaintiff and Brown, if unaided by that of Stewart, Seymour and Rait, in connection with that given by the defendant, James Pollock, Jr., McKay, J. L. Douglas and E. L. H. Gardiner, might have resulted in a verdict for a less amount than was given. The testimony of Stewart, Seymour and Rait, if received, and regarded by the Jury as competent to influence their conclusions, was calculated to affect the amount of the verdict. The Court not only cannot say that it did not, but must believe that it did. The Court is not able to see that substantial justice has clearly been done. According to the evidence, the plaintiff gave but little time to the defendant's business after the 1st of February, 1859. He may have given all that it required, but that is no reason why he should be paid more than his services, during that period, are worth. Taking his own testimony to be accurate, that he told the defendant at the time of being employed that "this work would be worth * * at the rate of \$1,000 a year," it is clear that up to February 1, 1859, he did not expect more, and must have considered that the defendant did not expect to pay more. Subsequent to that

Poultney v. Randall.

time, I think it quite clear that his compensation should be less.

I think, therefore, that it is a case, in which a verdict has been rendered upon incompetent evidence necessarily calculated to affect the result; that there is much reason to suppose injustice has been done, and that the defendant, though personally liable to the plaintiff, is acting in a representative capacity, and that a new trial should be granted on the terms of paying the costs of the trial and all subsequent costs, except the costs of the appeal, and that they should be costs in the cause and abide the event; unless the plaintiff stipulates within ten days to remit from the judgment the sum of \$341³/₄, an error in the computation, and the further sum of \$375, and interest thereon from May 1, 1860, in which event the judgment should be affirmed for the residue. Each party to bear his own costs of the appeal.

The other Judges concurring, it is ordered accordingly.

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**BENJAMIN POULTNEY, Guardian of Maria Poultney, &c.,
Plaintiff, v. JOHN RANDALL, Defendant.**

1. An agreement between the guardian of an infant and the person becoming surety in his official bond, that the latter shall hold the property of which the guardian is custodian, for his own indemnity is void, because subversive of the objects of the appointment and security, and contrary to public policy. The guardian cannot pledge the property of his ward as security to his own surety.
2. Hence it is no defense, in an action by the guardian, against one who has collected moneys of the estate and refuses to pay them over, to show that the defendant became the guardian's surety upon such an agreement, and that the guardian is insolvent, and to offer to pay the money into Court.

(Before BOSWORTH, Ch. J., and MONCRIEF and ROBERTSON, J. J.)

Submitted, February 13, 1862; decided, March 15, 1862.

THIS is an action by the plaintiff as the general guardian of an infant and her estate, to recover moneys admitted by the defendant to have been collected by him, to the use

of the plaintiff as such guardian. The defendant, admitting the sum of \$1,132.47 to be in his hands, belonging to said infant, set up in his answer, and claims by way of defense, that he became surety for such guardian upon condition that he, this defendant, should receive and collect the rents and income belonging to the infant, so that the defendant might hold himself safe and harmless in case of the default of the guardian to fulfill the condition of his bond. That the guardian executed a power of attorney to the defendant to collect, &c. That said guardian is insolvent, and if the defendant is compelled to pay over the moneys he has collected, the guardian could not pay the said bond, and that such payment would fall wholly upon the defendant.

Upon the trial, which was before Mr. Justice WHITE and a Jury, on November 22d, 1861, the plaintiff having proven his appointment by the Supreme Court, as general guardian, &c., rested his case; the defendant thereupon offered to prove the several matters alleged in his answer; the counsel for the plaintiff objected to the evidence, and it was excluded and the defendant duly excepted. The Judge thereupon directed the Jury to find a verdict for the plaintiff, for the sum of \$1,196.93, which was accordingly found; and directed the exceptions to be heard in the first instance at the General Term of this Court, and judgment to be stayed until the decision of the General Term.

Alexander W. Bradford, for defendant, submitted the following points:

I. The distinction between legal and equitable remedies no longer continues. (Voorhies' Code, 217, § 150.)

II. Consequently the answer may set up new matter of an equitable nature constituting a defense to the action. (Code, 214, § 149, notes *e*, *f*.)

III. The plaintiff became general guardian under an agreement with his sureties for their indemnity, and for the security of the fund. He now seeks to repudiate the

Poultney v. Randall.

agreement, and, by action at law, obtain possession of the fund. This breach of contract should not be made the basis of pecuniary injury to the defendant, unless there be some insuperable barrier to granting relief.

IV. If, as general guardian, the plaintiff can bring an action in any Court, in respect to the proceeds of the sale of real estate, under special proceedings, then the defendant can avail himself of his equitable defense before the tribunal so selected.

V. Though the action is instituted by the plaintiff, as general guardian, yet it is not brought for the property of the ward, but for money collected by the defendant, and mixed with his funds. It was not necessary, therefore, for the plaintiff to declare in his representative character. (1 Chitty's Plead., 23.)

VI. As soon as the surety's obligation to pay is absolute, he is entitled in equity to require the debtor to exonerate him, and he may file a bill to compel an exoneration, although the creditor has not demanded payment of him. (Theobald, Principal and Surety, 169.) A surety, generally speaking, may come into a Court of Equity and apply, for the purpose of compelling the principal debtor, for whom he is surety, to pay in the money and deliver him from his obligation. (*Nisbet v. Smith*, 2 Bro. C. O., 579.)

VII. In this case the principal is endeavoring to deprive the surety of the counter-security, on the faith of which he became surety. His insolvency alone would justify equitable relief on an original bill by the surety. Certainly the Court cannot place this fund in his hands when apprised by the answer of its unsafety.

VIII. If it be said that the defendant cannot avail himself of the defense in this Court, then the plaintiff cannot bring his action in this Court.

This objection is, of course, based on the idea that the subject of the action is the proceeds of a fund derived from the sale of real estate by order of the Supreme Court.

If the minor is to be considered as a ward of the Supreme Court, that Court has sole and exclusive jurisdiction over

Poultney v. Randall.

the defendant, who was the "person intrusted with the disposition of the income, &c." And, if not a ward of that Court, then there is no bar to giving the proper equitable relief in this Court.

• In the former case, the complaint should have been dismissed; in the latter, the judgment should have been for the defendant, on payment of the money into Court.

Charles H. Hunt, for plaintiff, submitted the following points:

I. The alleged agreement is not *inter partes*. The trust estate is not bound by the strictly personal undertakings of the trustee, whether entered into before or after his appointment.

II. The agreement set up by the defendant is illegal and void. 1. It was an agreement to do what the law will not permit to be done, namely, the private abdication of the office of trustee. (Hill on Trus., 266; 1 Pars. on Cont., 116.)* 2. It was immoral; an agreement to deceive the Supreme Court, and trifle with the estate of the infant *cestui que trust*.

III. The kind of relief which the defendant pretends to claim cannot be granted by this Court. As a part of the Chancery jurisdiction, now lodged by the Constitution in the Supreme Court, the latter has judicial control over the persons and estates of infants, including the appointment and removal of guardians, and has exercised that jurisdiction here, satisfying itself in the way pointed out by law. (As to jurisdiction in removal of trustees see 1 R. S., 730, § 70.)

IV. No Court, having jurisdiction of the subject, would remove the plaintiff on the suggestion of a mere meddler, like the defendant. The application should be made on behalf of the infant, and by a person showing some kind of right to represent her. (Same statute.)

V. Finally, no Court having the jurisdiction would exercise it, under any idea of protecting a man who says that he assisted in procuring a bad appointment by committing a fraud upon the Supreme Court.

Poultney v. Randall.

MONCRIEF, J. An agreement between the guardian of an infant and his surety, that the surety shall hold all the property of which the guardian is the legal custodian, for his own indemnity, is subversive of the objects of the appointment, and of the purposes of requiring the guardian to give security.

If effect be given to such an agreement, it would be beyond the power of the guardian to perform his duty. He could not compel the surety to pay him the money belonging to the infant; and failing to perform his duty, the infant's remedy would be against the surety. And that he would be compelled to seek through a substituted guardian, if the facts stated in the answer constitute a defense.

Upholding such a defense would lead to great abuse. Sureties for guardians would be persons who, as a condition of becoming sureties, would stipulate for the custody of the estate. Its proper use and safety would not depend in any degree upon the capacity or fidelity of the guardian. Whether it would be applied as the duty of the guardian required, would depend on the will of the surety, not on that of the guardian.

The guardian, if he has individual property, may pledge or mortgage it to indemnify his surety. But he may not pledge the property of his ward as security to his own surety, that he will do what the surety contracts he will do, viz., duly perform his duties as guardian.

Any agreement between the guardian and his surety, in respect to the property of the ward, which interferes with the guardian's power to perform all the duties in respect to it, devolved upon him by his appointment, should be treated as void, upon considerations of public policy, and a fraud upon the statute requiring security for the due performance, by the guardian, of his duties as such.

It is not suggested that this Court has power to remove the guardian and should do so as a part of the relief to which the defendant is entitled in this action. If, within the knowledge of the surety, the guardian is unfit to be

Howard v. Holbrook *et al.*

continued, the surety cannot keep the infant's money and act as guardian *de facto*. The facts stated in the answer constitute no defense to the action, and judgment should be entered for the plaintiff in accordance with the verdict.

BOSWORTH, Ch. J., and ROBERTSON, J., concurred in this opinion.

JOHN T. HOWARD, Surviving Partner of J. Howard & Son, Plaintiff, v. WILLIAM R., and ELIZABETH T. HOLBROOK, Executors, &c., of Darius B. Holbrook, deceased, Defendants.

1. The words "for value received," in a contract, sufficiently express the consideration within the requirement of the statute of frauds.
2. Where the contract sufficiently expresses the consideration on its face, a new trial will not be granted for error in admitting evidence of the actual consideration in support of the validity of the contract.
3. In proving a tender, under an agreement by defendant's testator, that he would purchase a bond if offered to him on a specified day, the witness testified that on that day he presented it at testator's place of business, he not being there and being represented to be out of town, that at a subsequent day the witness called there, and found a person who answered to the name, and acknowledged the agreement to be his, but said he could not redeem the bond, and who, on being told that the witness had been there twice before, said that he had been out of town. There was no evidence that the testator was not out of town, or that he was out of town and within the State. *Held*, that the testimony was *prima facie* sufficient to excuse a personal tender on the day, and was sufficient to go to the Jury on the question of identity. ROBERTSON, J., dissented.

(Before BOSWORTH, CH. J., MONCRIEF and ROBERTSON, J. J.)

Heard, February 13, 1862; decided, March 29, 1862.

THIS was an action for the price agreed to be paid by the defendants' testator to the plaintiff and his deceased partner, for a bond of the Newfoundland Electric Telegraph Company, under an agreement in the following words:

Howard v. Holbrook et al.

"For value received, I hereby guarantee to Messrs. J. Howard & Son, that the bond of the Newfoundland Electric Telegraph Company, No. 17, for two hundred pounds sterling, shall be of the value of nine hundred and sixty dollars on the seventh day of March, 1855, at which price; and at which date, I will purchase the same, if offered to me.

"March 8th, 1853.

"D. B. HOLBROOK."

The complaint set forth the partnership of the plaintiff and John Howard, deceased, under the firm of J. Howard & Son, and that Darius B. Holbrook, the defendant's testator signed the agreement in question. It further alleged that on the 7th of March, 1855, the bond therein mentioned was not of the value of 960 dollars, or of any value, and that on or about that day, it was offered to him, and he refused to purchase the same; that the plaintiff had offered such bond to the defendant, and demanded payment of the sum of 960 dollars, which they refused. The plaintiff demanded judgment for \$960, and interest. The defendants' answer was a general denial. The material portions of the evidence are stated in the opinion. The cause was tried on November 19th, 1861, before Chief Justice BOWORTH, and a Jury, who found a verdict for the plaintiff. And the Court directed the defendants' exceptions to be heard in the first instance at General Term.

Alexander W. Bradford, for defendants, submitted the following points.

I. The action cannot be maintained on any construction that can be given to the contract.

1. The agreement to purchase is merely executory of the guaranty, and the guaranty is void, because it does not sufficiently express a consideration. (3 R. S., 5th ed., 221; *Hall v. Farmer*, 5 Denio, 484.)

2. Admitting that the words value received, express a sufficient consideration, (*Brewster v. Silence*, 4 Selden, 207,) there is no proof in the case of the happening of the

Howard v. Holbrook et al

contingency, which would fix the liability of the guarantor. The only authorities to be found in support of the proposition that the words, "value received," express sufficient consideration are cases on promissory notes which have been overruled. (*Draper v. Snow*, 20 N. Y. R., 331.)

II. If the instrument be not a guaranty, it is not valid and binding as a contract for the repurchase of the bond therein mentioned, because

1. It was then a contract for the sale of a thing in action, for a price exceeding fifty dollars, and no note or memorandum in writing was signed by the parties to be charged thereby, and it is not pretended, that any part of the purchase-money was paid by the buyer.

2. If it be a valid contract for the repurchase of the bond in question, it was nevertheless subject to the condition therein contained, viz., that the value of the bond in the market, was less than the sum of nine hundred and sixty dollars. There is no proof in the case on this point; and the plaintiff should have shown it affirmatively and positively, to entitle him to retain the judgment.

III. If the instrument be not a guaranty, or a contract for sale or repurchase, it is then a wager and the defendants are clearly not liable.

IV. The testimony of Norris, as to the consideration of the instrument, is inadmissible. (*Hall v. Farmer*, supra.)

V. There is no sufficient proof of a demand on D. B. Holbrook. The testimony is but vague and uncertain.

Lewis L. Delafield, for plaintiff, argued the following points:

- I. This agreement is to be regarded as a contract of purchase and sale.

1. There are two distinct parts to the agreement, on either of which the plaintiff might maintain an action.

2. The plaintiff has elected to treat this as an agreement of purchase and sale.

3. It was therefore unnecessary that he should offer any proof of the value of the bond on the 7th of March, 1855.

Howard v. Holbrook et al.

II. If, however, this agreement is to be construed a guaranty, the words, "for value received," are a sufficient expression of the consideration. (2 R. S., 317, § 2, 4th ed.; opinion of Judge COMSTOCK, in *Church v. Brown*, 21 N. Y. R., 332; and see pp. 316, 321; *Watson v. McLaren*, 19 Wend., 563; *Douglass v. Howland*, 24 Id., 40; *Staats v. Howlett*, 4 Denio, 563; *Prosser v. Luqueer*, 4 Hill, 423; *Brewster v. Silence*, 4 Seld., 215; *Cooper v. Dedrick*, 22 Barb., 517; *Miller v. Cook*, 23 N. Y. R., 495.)

III. A consideration being expressed in the agreement, the introduction of testimony showing the real consideration was, either proper, or, if improper, was immaterial. (Code, § 176; *Edmonston v. McLoud*, 16 N. Y. R., 545.)

IV. The presentation of the bond and agreement at Mr. Holbrook's office, on the 7th of March, he being absent from the city, and the subsequent presentation and offer of the bond to him within a reasonable time after he returned to town, were an ample compliance with the condition contained in the agreement.

1. He who prevents a thing being done, shall not avail himself of the non-performance he has occasioned. (*Fleming v. Gilbert*, 3 Johns., 531.)

No party can insist upon a condition precedent, when its non-performance has been caused by himself. Such non-performance cannot prevent the accruing of a right, or its enforcement by action. (*The Mayor v. Butler*, 1 Barb., 326; *Smith v. Gugerty*, 4 Id., 621; *The People v. Bartlett*, 3 Hill, 570; *The People v. Manning*, 8 Cow., 297.)

BOSWORTH, Ch. J. The instrument of March 8th, 1853, signed by the testator, is, on its face, a valid contract. As an original undertaking or agreement, this point is free from difficulty. As an agreement within the statute of frauds, it is good on its face, according to the recent case of *Miller v. Cook*, (23 N. Y., 495.)

The admission of the deposition of Norris, is not an error requiring a new trial. If the agreement on its face, expressed sufficiently a consideration that made it obliga-

tory, proof of the actual consideration could not possibly prejudice the defendants.

The charge of the Judge is not given. It should be presumed to have related to the only question of fact that could be properly submitted, viz., whether the witness Keeler, actually presented the bond (No. 17) to the testator, and he refused to redeem it, stating that "he had not got the money," &c., &c. The witness is quite confident that he presented it on the 7th of March, 1855, at the testator's place of business, he not being there, and being represented to be out of town. That he subsequently called and found there a person who answered to the name, who acknowledged the guaranty to be his, but said he could not redeem it; and who, on being told that the witness had been there twice before, said that he had been out of town.

If the evidence was insufficient to be submitted to a Jury, a new trial should be granted, as the Court refused to dismiss the complaint, and the defendants excepted.

It may be that a tender to the testator personally, was indispensable, even though he was out of town, if within the State. (*Smith v. Smith*, 2 Hill, 351; *Watson v. Hetherington*, 1 Car. & Kir., 36.)

But as the testator did not refuse to pay, on the ground that no tender had been made to him personally on the 7th of March, and as he admitted he had been out of town, and did not suggest that he had not, nevertheless, been out of the State, I think the evidence is, *prima facie*, sufficient to show that his absence was conceded to be such as made a tender to him personally, excusable.

There was no attempt by the defendants to prove that he was not out of town, or was within the State.

Evidence that on the two or three occasions, when the witness first called at the testator's place of business he was told the testator was out of town and that there was no one there to represent him, and that subsequently he found there a person answering to the name, who said he was the man, and admitted the contract to be his, but

Howard v. Holbrook *et al.*

refused to pay the money, is competent to go to a Jury upon the question of his identity, and sufficient to uphold a verdict, in the absence of all evidence tending to raise any suspicion of mistake or collusion. (*Roden v. Ryde*, 4 Ad. & Ellis N. S., 626; *Murieta v. Wolfhagen*, 2 C. & K., 744; *Hunt v. Maybee*, 3 Seld., 270, 271; *Hatcher v. Rocheleau*, 18 N. Y. R., 86, 92, 96.)

The fact asserted by the witness, that he called at Mr. Holbrook's place of business, was not attempted to be discredited, by any cross-examination of the witness, or other evidence tending, or apparently designed to throw any doubt upon its accuracy. Under such circumstances, and in the absence of all evidence tending to excite a suspicion that the witness did not see Mr. Holbrook, but on the contrary saw and conversed with some other person, I think the evidence sufficient to warrant the inference that he saw Mr. Holbrook, and had with him the conversation testified to. I think, therefore, that the judgment should be affirmed.

MONCRIEF, J., concurred in this opinion.

ROBERTSON, J., (dissenting.) There are two stipulations contained in the brief instrument which forms the subject of this action, as I read it: the first is an undertaking that a certain chose in action shall be worth a certain sum of money, on a certain day, and the second is an agreement to buy it at that price, on that day, if offered to the party signing it; on the first, the plaintiff's firm would have been entitled to recover only the difference between the market value and the stipulated value; on the second, the plaintiff's firm could only recover the stipulated price, after a tender of the bond sold, to the purchaser.

The plaintiff is probably right in claiming, that the use of the words "value received" and the terms of the contract would be sufficient to constitute "*an expression of the consideration*," within the meaning of the statute to prevent perjuries, (2 B. S., 317, § 2, 4th ed.,) under the deci-

Howard v. Holbrook *et al.*

sions in this State. (*Watson v. McLaren*, 19 Wend., 563; *Douglass v. Howland*, 24 Id., 40; *Staats v. Howlitt*, 4 Denio, 563; *Prosser v. Luqueer*, 4 Hill, 423; *Brewster v. Silence*, 4 Seld., 215; *Cooper v. Dedrick*, 22 Barb., 517; *Church v. Brown*, 21 N. Y. R., 316, 321, 332; *Miller v. Cook*, 23 N. Y. R., 495.) But the stipulation for indemnity hardly brings it within the statute, as it is not a guaranty for the payment of the bond, but for its market value, like that of any other commodity. At the same time, I do not perceive that the contract to purchase the bond in question, contained in the instrument in question, was subject to any condition as to its being worth less than the price named. The agreement gave the plaintiff's firm the option of either to sue upon the contract of indemnity for the difference between the named and the market price, or for the whole specified price on a tender of the bond.

There was no evidence given of the value of the bond, so that the plaintiff could not recover damages upon the contract of indemnity, except those which were merely nominal. If the action be for the price of the bond, a difficulty may arise from want of proof of a tender to Mr. Holbrook on the 7th of March, the time fixed in the contract. The application on that day was only at his office, (if it were his;) the subsequent tender made to some person, in the same place, calling himself by his name, is subject to considerable question as to the identity of the person. It was made, in a place supposed to be his office, where he had a desk, to some one calling himself by his name. This is hardly enough on the question of identity; as to which its efficacy must rest on the facts of its being the office of the defendants' intestate, and this declaration of the person as to his name.

In regard to the question, whose office it was, it is very plain, that as the witness did not know Mr. Holbrook personally, he could not legally know the place to be so, or his place of resort or business, unless he knew it to be so, by repute or hearsay, neither of which would be legal evidence of the fact, on a question of the identity of a person in it

The declaration of the person applied to, as to his reputed name would clearly be no evidence against the defendants, unless it be assumed in advance, that such person was the defendants' testator, which begs the question. Nor would a single declaration to that effect amount to evidence that the name was the reputed one of the party assuming it; such a fact can only be proved by repute among those familiar with the person.

It is true, that proof that a person, really of the same name with the party sued, executed a contract, is *prima facie* evidence that they are the same, in reference to a contract sued upon; but similarity of names has never been held to be evidence of identity in any other transaction necessary to establish a liability. It was held in the English Court of Exchequer, by all the Judges, (BAYLEY and VAUGHAN, B.B., and Ld. LYNTHURST, Ch. B.) in the case of *Whitelock v. Musgrave*, (1 Cr. & Mees., 511,) that although proof of the handwriting of a subscribing witness was evidence of an execution of an instrument by some one, of the name mentioned in it, further evidence was necessary of the identity of such person with the defendant. The same views had been previously expressed by one of the same Judges, in *Nelson v. Whittall*, (1 Barn. & Ald., 21.) In a subsequent case of *Roden v. Ryde*, (4 Q. B., [Ad. & E.,] 626,) Ld. DENMAN attempted to answer the argument of the hardship of imposing upon the defendant the necessity of proving a negative, by considering the danger of suing the wrong person, and suggesting that the evidence could be easily baffled by introducing the defendant and asking if he were the person. Both these answers would be easily disposed of in this case; the real defendant is dead, no one therefore knows how to prove an *alibi*, and there is no danger except of paying costs on serving a summons on the wrong person.

The necessity of some proof of identity in persons living in large cities has been fully recognized in *Hubback on Successions*, (pp. 103, 464, 465,) and in regard to a register of persons' names in other cases. (*Birt v. Barlow*,

1 Doug., 171; *Bain v. Mason*, 1 O. & P., 202, n.; *Wedgwood's Case*, 8 Greenl., 75.) In Buller's *Nisi Prius*, (1716,) it was held, that a man's calling himself by a particular name was not sufficient evidence of his being so. In *Jones v. Jones*, (9 M. & W., 75,) all presumption of identity was repelled by proof that several persons of the same name lived in the same place. No case is to be found where a person's calling himself by a particular name on one occasion was held evidence of his being a defendant of the same name; if such were the law, it might often be found extremely difficult in a large city to prove the negative.

The two separate facts, therefore, of the ownership of the office, and the reputed name of the person, not being proved, the combination is not of much advantage. Proof that a person called himself by a particular name, in an office, by common report belonging to a person of the same name, will not establish the identity of such person with the defendant.

It would be a dangerous relaxation of the rules of evidence to allow the temporary assumption of a name to be evidence that the person assuming it bore the name and was the defendant; although it was made in his reputed office. Annals of criminal jurisprudence are filled with frauds committed by such means; no person of ordinary prudence would pay a large sum of money upon such evidence of identity.

Besides this, the demand and refusal was not explicitly applicable to the \$960 mentioned in the contract. The demand was for the money in the bond and the refusal was to redeem it; possibly, however, the Jury were at liberty to infer it referred to the price of the article.

Mr. Holbrook's absence from town was no excuse for not presenting the bond on the proper day, if he was within the State. (*Watson v. Hetherington*, 1 Car. & Kir., 36; *Smith v. Smith*, 2 Hill, 351.) There was no evidence that he left town to avoid a tender, or that he resorted to any artifice to prevent it. The plaintiff's firm accepted the contract in its present general form, and therefore took the risk of finding the defendant on the day fixed.

Cheeseman v. Sturges et al.

There was, therefore, no absolute hindrance of the performance by the defendants' testator. Whether there was a waiver of performance in due time, will remain to be determined, after the identity of the party refusing it on a subsequent day, shall be established by proper evidence, on a new trial.

Evidence was also admitted to show the actual consideration for the agreement in question: this was unnecessary, if the rule of law be as already stated, that the consideration must be expressed on the face of the instrument; and as an exception was taken to its admission, whatever may be its immateriality, such exception furnishes sufficient ground for a new trial.

For these reasons there should be a new trial in this case and the judgment reversed, the costs to abide the event.

Judgment for the plaintiff.

JAMES L. CHEESEMAN, Plaintiff and Appellant, v. JAMES H. STURGES *et al.*, Defendants and Respondents.

1. S., one of the defendants, held real and personal property in trust, to be used for the joint benefit of himself and the plaintiff, and a third person, in specified proportions, as copartners in a joint enterprise, and under an agreement that he was to make advances for carrying out the enterprise, and that all stocks or other securities than cash, which should be received, should remain undivided until a final settlement, and that he would not dispose of the property (other than money) without the consent of the others. He accordingly made large advances, and subsequently sold and conveyed all the property without the consent of the plaintiff, and received therefor stock of an incorporated company.

Held, that the plaintiff, by bringing an action, with full knowledge of these facts, in which he demanded a transfer of his share of the stock, and obtained an injunction against any disposal of it, pending the action, must be deemed, for the purposes of this suit, to have made his election of this remedy, and must be treated as if he had consented to the sale.

2. Hence the proper relief in such action is that the plaintiff should pay his proportion of the advances and have a transfer of his share of the stock, and in default of his paying, that his share of the stock should be sold, and that he should pay the deficiency, if any.
3. The plaintiff is not entitled to a judgment that the whole stock be sold to pay the advances, and that the residue of the proceeds, or the deficiency, if

Cheeseman v. Sturges *et al.*

any, be apportioned. The defendant may be allowed to retain his share of the stock, on being charged with his part of the advances.

4. After the commencement of this action, but before the trial, the corporation, the stock of which was in controversy, increased its capital stock, without, however, altering the nominal value of a share; and subsequently certificates of stock of the new issue were deposited in Court to await the result of the action.

Held, that if the plaintiff desired to make any claim against the defendant, based on his individual acts, in effecting such alteration in the stock, pending the action, he should have modified his pleadings accordingly. But by going to trial he must be deemed to pursue the stock as it existed after such increase.

(Before BOSWORTH, Ch. J., and MONCRIEF and ROBERTSON, J. J.)

Heard, February 13, 1862; decided, March 29, 1862.

APPEAL by the plaintiff from a judgment entered after a second trial, before Mr. Justice HOFFMAN, at a Special Term, on the 9th of March, 1861.

This action was brought against James H. Sturges, Andrew Thorp and Thomas S. Thorp, who were partners in a joint enterprise. The details of the facts briefly stated in the head note, fully appear in the report of a former decision, in 6 Bosw., 520, and in the opinion of the Court stated below.

Upon the second trial it was adjudged that the plaintiff was indebted to the defendant Sturges, in the sum of \$25,271 $\frac{1}{4}$, and it was further adjudged that the defendants held as security therefor, 1,866 $\frac{1}{2}$ shares of stock in the New York Ice Company, to which plaintiff should be entitled, on payment of his indebtedness, and interest, within sixty days, and that if plaintiff failed to pay, the shares should be sold by a Referee, and the indebtedness be paid out of the proceeds, rendering the residue to the plaintiff, or, if there should be a deficiency, that the defendant, Sturges, should have judgment and execution against him therefor.

James W. Gerard, for plaintiff, (appellant.)

I. The Justice found, as a matter of fact, that Cheeseman was not a party to the sale made by the defendant, Sturges, to the New York Ice Company, nor to the invest-

Cheeseman v. Sturges et al.

ment by Sturges in 6,000 shares of the capital stock of the New York Ice Company, and did not consent to it afterwards.

The Judge erred in deciding, that the plaintiff having elected to look to the stock of the New York Ice Company for his indemnity, with knowledge of the actual capital being \$350,000, and having availed himself of the remedy, by injunction, to prevent its transfer, and secure it for his demands, was precluded from any relief in the shape of a judgment for money, on the case he makes in his complaint.

II. The Justice should have given judgment in favor of Cheeseman, against defendants, for the cash balance, on the sale of the property by Sturges for \$140,000; and to satisfy that judgment he should have ordered sold by a Referee, the stock on file, and as much more as was necessary for that purpose. Sturges is to be considered as a trustee violating his trust, one condition of which was, that he would not sell without the consent of Cheeseman. Another reason why Cheeseman should have a judgment for cash is, because the defendants destroyed the original capital of the New York Ice Company without the knowledge or consent of Cheeseman, and in violation of the injunction.

The plaintiff in his complaint claimed that he was entitled to have the balance paid to him in cash, but as Sturges was insolvent, that he had a right to have enough of the stock sold to pay his judgment in full, even if the sale of the whole stock was necessary for that purpose.

The Justice should have given a judgment in favor of the plaintiff, for the balance found in his favor, in cash, with an equitable lien and power to sell any amount of stock necessary to pay that balance. (2 Story's Equity Jurisprudence, §§ 1265, 1232, 1257, 1258, 1259; Hovenden on Frauds, 468, 470, 471; *Wallace v. Duffield*, 2 Serg. & R., 521, 529; *Lewis v. Maddocks*, 17 Vesey, Jr., 47, 57; 16 U. S. Dig., 626, citing 9 Texas, 482; *Willis on Trustees*, 64.

III. If not a money judgment, Cheeseman was entitled to a judgment for one-third of the number of shares of

stock at par, (6,000 shares,) remaining after allowing so many shares to Sturges at par as was necessary to pay the money advanced by Sturges to carry out the enterprise.

Sturges should be compelled, upon every principle of equity, to take the stock at par for his advances, as Cheeseman is compelled to take it at par for his balance, and the Thorps not being *bona fide* purchasers of the stock for present value without notice, they stand on the same footing with Sturges, and no higher.

IV. At all events, and under all circumstances, if the Court sustains all the doings of the defendants, the Justice erred in his judgment in ordering to be sold only 1,867 shares of this last stock, which he awarded to Cheeseman, at par, for one-third of the shares of the stock received by Sturges, instead of ordering all the stock to be sold and reduced to cash, paying Sturges his advances, and giving to Cheeseman his one-third of the balance. The Judge has considered this a case of copartnership, and by the law of partnership, on a dissolution and winding up of the concern, all the assets are to be sold and reduced to cash, and the cash divided among the partners as the balance due to and by them respectively may appear by their respective accounts. (2 Hoffman Ch. Pr., 131; 4 Sandf., 311.)

V. There could be no judgment against Cheeseman for money, in any event. Sturges and Braisted were to furnish all the money, as a condition of their being allowed to participate in the enterprise, and they were to look to the proceeds resulting from that enterprise alone for reimbursement. Therefore the judgment, to this extent, should have been, that Sturges be paid his advances out of the stock, first, either by taking the stock at par, or selling as much as was necessary to pay all his advances, and to divide the balance of the money or the stock among them, (Cheeseman, $\frac{1}{3}$.) and if the stock was sold and did not produce enough to pay Sturges his advances, he could have no judgment against Cheeseman for a third of the deficiency. If Cheeseman gets nothing, he is not to be a loser by the enterprise.

Cheeseman v. Sturges et al.

John N. Whiting, for defendants, (respondents.)

I. The amount found due by the plaintiff to the defendants is upon a computation favorable to the plaintiff.

II. Cheeseman was a party to the exchange for the stock of the New York Ice Company, and such exchange is to be considered his own act. We contend that the facts show that he concurred in it, and that he ratified it.

III. The only judgment which plaintiff might have claimed, was for a transfer to himself of one-third of the stock of the New York Ice Company, held by the defendants as the proceeds of the property of the joint enterprise, viz.: one-third of \$140,000 of said stock, upon the payment by said plaintiff of one-third of the charge against it.

IV. Any judgment which would apply the stock in the hands of the defendants as if it were money, to the satisfaction of the charges against it, and impose upon the plaintiff an equality of condition with the defendants, in the residue only, would be manifestly erroneous.

1. The charges constituted a money debt, binding the plaintiff personally, and a burden upon the property.

2. If the property had remained of its original character, the requirement from the creditor partner, or from the trustees holding a claim upon the property, to take his pay in the property at any assumed, or even at any proved valuation, would have been clearly erroneous.

3. If the exchange had been made by Sturges, without Cheeseman's procuration, the plaintiff had his election of remedies against Sturges, either,

- (a.) To charge him for a wrongful conversion, or
- (b.) As a simple contract debtor upon a breach of trust, or
- (c.) To adopt the transaction as his own contract, recognize Sturges as his agent in its accomplishment, and follow the proceeds, for his share of the same.

He has elected the last named by the form of his action and the prayer of his complaint.

Having made such election, the whole transaction of Sturges, as matter of law, must be treated as a contract voluntarily entered into by Cheeseman, and all charges

Cheeseman v. Sturges et al.

and suggestions as to wrongdoing must be lost sight of and dropped. (2 Story's Eq. Jur., §§ 1262, 1263, 1285, 1286; *Murray v. Lyburn*, 2 Johns. Oh. R., 442; *Murray v. Ballou*, 1 Id., 581; *Pocock v. Reddington*, 5 Ves. R., 800; *Long v. Stewart*, Id., note; *Harrison v. Harrison*, 2 Atk. R., 122; *Vernon v. Vawdry*, 2 Id., 119; Collyer on Partnership, § 182; Story on Agency, §§ 439, 214.)

The right to adopt the transaction as his own, if availed of, must be relied upon entirely, and the party is not entitled in addition to any of the usual claims and remedies against a wrongdoer. (*Murray v. Lyburn*, 2 Johns. Oh. R., 442.)

4. Any division or distinction between the stock to the amount of the debt, and the surplus over and above that amount, requiring the defendants to account for so much of the stock held by them as is nominally equivalent to the debt, as money, and as to the residue requiring them to account for the plaintiff's proportion of stock only in kind, would be supported by no reason or principle.

V. The interest of Cheeseman in the stock being encumbered by a lien, the judgment, as far as he had a right to pray for one, could be for the delivery of nothing. There is no pretense that he ever made tender of his share of the advances. He could, at any time, have arranged to sell his stock (one-third), and tendered the purchase-money, if equal to one-third of the advances, and he would have obtained his stock.

No action thereupon was necessary on his part, as he had his rights, at all times, without the assistance of the Court.

The only judgment which could be properly granted in the cause would be on application of the defendants, and for a foreclosure of their lien, and a sale of the stock to repay the same.

BY THE COURT—BOSWORTH, Ch. J. When this cause was before the general term on an appeal from the judgment entered on the report of a Referee, the Court held

Cheeseman v. Sturges et al.

that the claims of the plaintiff must be adjusted either upon the principle, first, that the plaintiff has ratified the sale to the New York Ice Company, or second, that he entirely repudiates that sale. (6 Bosw., 520, 531.)

Waiving, for the present, the question, whether the plaintiff must be deemed to have made an election between these principles, by which he is concluded in this action, what are his rights, when tested solely by contracts to which he is a party?

The agreement of the 21st of August, 1855, between Cheeseman, Braisted & Sturges, by the covenant contained in it "that all stock or other securities than cash, provided for in said contracts, as part of the consideration for the performance thereof, shall remain undivided until a final settlement," imports that, by "said contracts," Cheeseman, and Cheeseman and Christie, were to be paid by the People's Ice Company, partly in money and partly in stocks. That agreement also imports, that the money, which it was contemplated the People's Ice Company would pay in performance of the said contracts entered into with them, would be applied to refund "all moneys advanced" by either of the three, in the performance of that agreement.

The declaration of trust, (as it is called) viz.: the covenant by Sturges of the 25th of September, 1855, shows that it was not intended, by conveying the property to which the agreement of the 21st of August, 1855, relates, to modify the rights or interests of either of these three parties in such property, or their relations to it, as between themselves; Sturges covenanted therein, to hold said real estate and premises, in trust for the three jointly; not to convey or encumber it except for the purpose of said contracts, and then only with the consent and approbation of Cheeseman & Braisted.

Looking at all the provisions of the agreement of the 21st of August, 1855, in connection with the covenant of Braisted & Sturges to pay, furnish and supply "all the necessary money and means to fully carry on and perform

said contracts," and in connection also with the declaration of trust of September 25, 1855, I think it was the understanding of these three parties, that when the contracts with the People's Ice Company were performed, and the latter had made the payments which they had stipulated to make, the money received from them would be applied by Sturges to reimburse moneys advanced, and that either of them would then have a right to call for a final settlement. Sturges was precluded by his covenant from disposing of anything, other than money, which he might receive, until a final settlement was had between them. In this view, if the contracts had been performed, and the People's Ice Company had paid the stipulated price, and if the money received by Sturges was insufficient to pay his advances, then any balance, payable either by Braisted or Cheeseman, it would be his right to demand, on transferring to him his aliquot part of "all stocks or other securities than cash" which should then "remain undivided."

Whether, in the event that Cheeseman refused or was unable to pay his aliquot part of the unsatisfied balance of the advancements, Sturges could recover it by action at law, or would be compelled to bring an action for an account, and take a judgment for a sale of the undivided stock and other securities owned in common, and payment out of the proceeds, and if still a deficiency, a judgment against Cheeseman for his proportion of it, may be quite material, in one aspect of the case, in determining whether the judgment appealed from is erroneous.

If the latter was his only remedy, then the judgment is erroneous, even on the principle that the plaintiff ratified the sale to the New York Ice Company.

If the plaintiff has ratified that sale, then his interests and rights, in and to the property mentioned in the declaration of trust of the 25th of September, 1855, have become vested in and attach to 5,600 shares of the stock of that company, amounting to \$140,000. The property

held by Sturges in trust, was transferred for stock of the company, amounting to \$140,000.

The Court, at Special Term, has found that Cheeseman did not assent to a transfer, except upon the terms that the stock of the New York Ice Company should be \$430,000, and that \$215,000 of such stock, or half of the whole stock, should be obtained for the joint property. The capital of that company was fixed at \$350,000, and only \$140,000 of the stock was paid for this property, being \$35,000 less than half of the whole stock. And it is not found, as a fact, that Cheeseman ratified this sale. On the contrary, as I construe the statement of facts found, the Court finds that, as a matter of fact, Cheeseman did not ratify the sale that was made.

The Judge held, as matter of law, (first,) that this action, by reason of the claim made in it, the form of the complaint, and the character of orders obtained in it at the plaintiff's instance, and other proceedings had therein, precludes the plaintiff from obtaining any relief in the shape of a judgment for money, in this suit.

And, (third,) that although the capital stock of the New York Ice Company has been changed pending this suit, by an increase of the capital from \$350,000 to \$500,000, so that the plaintiff cannot in any event, or upon any terms, obtain any part of the stock, precisely as it existed when this suit was commenced, yet as the plaintiff has proceeded to trial with full knowledge of the change in such capital, he is to be deemed to have elected to look to and seek his indemnity, out of the new and substituted stock, and "is entitled to resort to no other property or fund, or personal liability."

The conveyance of the property to the New York Ice Company, by Sturges, and what consideration he received for it, were known to the plaintiff before this suit was commenced. The facts are stated in the complaint, and the relief prayed is a judgment against Sturges that he account concerning the moneys paid to him prior to such conveyance, and the stock received by him as the con-

Cheeseman v. Sturges et al.

sideration of such conveyance, and that the defendants pay over and transfer to the plaintiff his just and equitable share of the said moneys and stock.

The plaintiff prosecuted the action, in this aspect and on this basis, to judgment. And he obtained a judgment, in substance and effect, that Sturges, after retaining enough of the stock, at its par value, to satisfy his advances, should transfer to the plaintiff his proportion of the residue of the stock, viz.: 754 shares, and pay the dividends that had been received thereon. (6 Bosw., 526.)

With this judgment the plaintiff was satisfied. The defendant appealed from it to the General Term: the judgment was reversed, and the Court, in the opinion delivered, states, as its conclusions, that the plaintiff had elected his relief, and was concluded by his election, and that he could not have more than his proportion of the stock, on paying his due proportion of the advances. (6 Bosw., 532, 533.)

In *Orme v. Broughton*, (10 Bing., 533,) TINDAL, C. J., says, that "after bringing an action in which the grievance alleged is the loss sustained by breach of the contract, I think it would be impossible to bring a second action, or to resort to any other means to enforce the contract, inasmuch as the first action is to be deemed an election as to the remedy sought."

In the case before us, the plaintiff, by his complaint, sought his proportion of the stock for which the property had been conveyed to the New York Ice Company, and pursued the claim for relief of that character, to judgment.

In *Gardner v. Ogden et al.*, (22 N. Y. R., 327,) it was held that the clerk of a broker, employed to sell land, having access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter, that, if he becomes the purchaser, he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land.

The vendor having brought a suit against both the broker and his clerk, making a claim against the broker for having fraudulently sold the land, and against the clerk

Cheeseman v. Sturges et al.

for a reconveyance or accounting, the Court said, (*Id.*, p. 340,) "In the present case, the plaintiff has elected to regard Smith (the purchaser) as his trustee, and his complaint, as to him, and the decree of the Special Term, proceeds on this basis. The plaintiff, therefore, elects to affirm the sale made to Smith. He cannot, *uno flatu*, affirm it as to him, and disaffirm it, as to Ogden." * * "The affirmance of the sale by the plaintiff, is a complete answer to the claim for damages against the firm for fraud in making the sale." (*Id.*, 341.)

In *Sanger v. Wood*, (3 Johns. Ch. R., 416,) Chancellor KENT says: (p. 422,) "Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies. * * * And I consider the going to trial in the action at law" (the fraud having been discovered a few days before the trial) "and especially the entry of judgment afterwards upon the verdict, as a decided confirmation of the settlement in April, 1816."

Evans v. Inglehart, (6 Gill. & J., 188,) affirms the same doctrine.

No more decided conduct in regard to electing between remedies open to a plaintiff, can be had, than exists in this case. With a full knowledge of the alleged wrong, and in a complaint stating it, judgment is prayed for the plaintiff's share of the stock into which the trust property had been converted. An injunction was sought and obtained restraining the transfer of it. And a portion of it has been retained within the control of the Court, pending this litigation, to satisfy any claim the plaintiff might establish.

It is settled law, that a party prosecuting two suits at the same time, upon the same cause of action, seeking in the one relief inconsistent with that sought in the other, will be compelled to elect which remedy he will pursue. And in the present case, the plaintiff has made his election and is concluded by it, for all the purposes of this suit, and of any relief that can be granted in it.

He must be treated, therefore, precisely as if the conveyance to the New York Ice Company had been made with his assent, and upon terms authorized by him.

In this aspect of his rights and liabilities, the property in which he and Sturges were interested had been converted into stock, and no money could be realized from it to pay the advances made by Sturges, except by a sale of the stock.

The agreement of the 21st of August, 1855, between Cheeseman, Braisted & Sturges, provides "that all stocks or *other securities than cash*, provided for in said contracts as part of the consideration for the performance thereof, shall remain undivided between them until a *final settlement*, and that neither of said parties shall sell or dispose of his interest in said contracts, or any of the proceeds *other than money*, without the consent in writing of the others."

I think it was the intent and understanding of the parties, that after the contracts had been executed and payment had been received, there should be a final settlement between the parties to ascertain how much was due to either for advances made, with a view to a division of what might remain after satisfying such advances.

The said agreement of the 21st of August, 1855, also provides, "that upon the performance and completion of the same (the said contracts), after refunding all moneys expended in the performance thereof, to the parties advancing and furnishing and providing it, and all costs, charges and expenses paid or incurred in the performance of said contracts, to *divide* and *apportion* the balance between them equally, share and share alike."

This agreement indicates very clearly that Cheeseman was not to make any pecuniary advances, pending the executing of the contracts, and that the advances to be made by the other parties were to be satisfied out of the money and stocks and other securities to be received for performing the contracts, and only the balance then remaining was to be divided between the parties.

Cheeseman v. Sturges et al.

The plaintiff insists that injustice has been done to him by the decision that he should pay his just proportion of the advances by a day named, and that in default thereof his third of the stock should be sold to satisfy that sum, or so much of it as may be necessary for that purpose, and that in case of a deficiency he should pay such deficiency. He further insists that enough of the whole stock should be sold to satisfy the entire advances, and that the residue, if any, should be divided, and in case it did not sell for enough to pay the entire advances, the plaintiff should be charged with only his proportion of the deficiency.

I am not satisfied that this claim is well founded.

The Judge found a balance, due to Sturges for advances,	
of,	\$79,058 75
If the stock would sell for 50 cents on the	
dollar, it would produce,	70,000 00
And leave a deficiency of,	\$9,058 75
One third of which is,	3,019 58

The latter sum would be amount of the plaintiff's loss, and double that the amount of Sturges' loss, as he has succeeded to Braisted's rights and liabilities.

Cheeseman's proportion of the \$79,058.75 is	\$26,352 92
His third of the stock, viz. \$46,666.66, at 50	
per cent would produce,	23,333 33
And his loss would be,	\$3,019 59

Hence it follows, that whether the whole stock be ordered to be sold to pay the entire advances, or only one-third of it to pay one-third of the advances, the result is precisely the same to the plaintiff, provided it may reasonably be expected that it can be sold at the same rate per cent, in each case.

And I know of no principle on which it is just to assume that it will sell at a higher rate per cent on a sale of stock amounting at its par value to \$140,000, than on a sale amounting at its part value to only \$46,666 $\frac{2}{3}$.

I am, therefore, of the opinion, that there is nothing inequitable in that part of the judgment now under consideration ; and if there is not, there can be no reason why Sturges should not be allowed to retain his share of the stock, on being charged with his part of the advances. The plaintiff cannot, in judgment of law, be benefited by compelling him to submit to a sale of it to work out the equities of the parties, and Sturges should, therefore, be left to his chances of realizing more by holding his stock, than from a sale of it *in presenti*. If permitted to retain his proportion, he also incurs the risk of a greater loss, but I am inclined to think that the plaintiff has no rights, which permit him to require a sale of the whole, *in presenti*.

If these views are correct, then the only question left, regards the effect of the increase of the capital of the N. Y. Ice Company, *pendente lite*.

The increase of capital from \$350,000 to \$500,000, was determined upon by the corporation, on the 27th of January, 1857. This action was commenced on the 14th of that month ; the plaintiff knew that the capital had been increased, as early as January 8, 1858. An order in this action was made as early as January 7, 1858, modifying the injunction orders previously granted, on a deposit of the stock of the N. Y. Ice Company with the Clerk of the Court, amounting to \$25,000 ; and on the 8th, certificates of 1,000 shares were so deposited, and these certificates were upon the increased capital of 500,000.

The trial, resulting in the present judgment, was had in March, 1861. If the plaintiff proposed to make any claim, based on the individual action of the defendant Sturges in effecting such increase of capital, he should have moved to adapt his pleadings to it, and have caused them to be so amended as to present the questions he designed to raise. Instead of doing that, he goes to trial, knowing of the increase of the capital, and must be deemed to have continued to pursue the stock in the company, as it existed after such increase of its capital. (*Sanger v. Wood, supra*).

This branch of the case may be viewed in another aspect. Supposing the property to have been conveyed to the N. Y. Ice Company, with the knowledge and assent of the plaintiff, for \$140,000 of its stock, (the capital being then \$350,000,) and this suit to have been brought to recover the plaintiff's proportion of such stock; the pendency of such a suit would not affect the capacity or right of the company to increase its capital, *pendente lite*; nor would the fact of such an increase affect the rights and liabilities of the parties to the suit, *inter se*, in respect to the stock forming the subject matter of such litigation. The par value of the shares continues unaltered, and the nominal increase of the capital is supposed and purports to be represented by a corresponding increase of actual capital.

And the plaintiff, in the case supposed, would receive, by the judgment of the Court, his portion of \$140,000 of stock as it existed, at the time judgment was pronounced. He would obtain the same number of shares, and of the same par value, and in judgment of law of the same actual value, as if the capital had not been increased.

The plaintiff, having elected to affirm the sale made to the New York Ice Company, occupies the same position as if he had been a party to such sale and had procured it. The result of these views is, that he cannot make the fact, that the New York Ice Company has increased its capital during this litigation, the basis of a claim to charge the defendant, in damages, for the cash value of the \$140,000 of stocks, as it existed before or at the time of the increase of the capital.

It is not the case of a fraudulent or wrongful conversion, by a defendant, *pendente lite*, of trust property, which a suit is instituted and seeks to reach, and to which, at the commencement of the suit, the plaintiff was entitled.

The conversion, or change in the character of the stock, is one of form rather than of substance, and that change has been made by the corporation, and not by the defendants.

This appeal has been argued by the counsel of the

Stewart *et al.* v. Keteltas.

appellant on the basis, and on a preliminary statement made by him to the Court, that he should assume the facts to be correctly found; and insist that on the facts found the judgment was erroneous. Considering only these questions, and no others were discussed, I think there is no error in the judgment, and that it should be affirmed.

The other Justices concurring in the opinion, judgment of affirmance was ordered.

**JAMES STEWART *et al.*, Plaintiffs and Respondents, v.
WILLIAM A. KETELTAS, Defendant and Appellant.**

1. Where a person employs different parties by distinct contracts, to do, respectively, the carpenter work and the mason work of a building, neither contractor being a party to the other's contract, and the contract of one not referring to that of the other, and the work being such that the performance of the carpenter work is necessary to enable the mason to perform his work, if, by a delay on the part of the former the latter is prevented from making strict performance within the contract time, he does not thereby become liable to the employer as for a breach of his contract, nor forfeit his right to recover for what he has done.

2. In such a case, where the masons brought their action to recover for the work, and the defense was that they had not completed it by the first of February, which was the time fixed by the contract:

Held, that there was no error in charging the Jury that if there was a delay or interruption of the work of erecting the building, resulting from the omission of the carpenters to do what was essential to enable the plaintiffs to proceed with their work, and if such delay was such as to throw the completion of the work over the first of February, then the plaintiffs would be entitled to recover, being prevented from completing their contract in time, by the act of the defendant or his carpenters.

Held, further, that upon the evidence in this case the Jury were warranted in finding that the plaintiffs were prevented by the carpenters from completing the work in time. (ROBERTSON, J. dissented.)

3. After a written contract for the construction of a building had been made, it was ascertained by the parties that certain work would be necessary, which, at the time of making the contract, was not anticipated, and the question which arose between them, as to who was to bear the expense of it, was settled by the employer agreeing to pay the contractors a specified sum for doing it, and relying on this promise they did it. *Held*, that he was not afterwards at liberty to insist that the written contract required them to do it at their own expense.

Stewart et al. v. Keteltas.

4. Under a provision in a contract to do the mason work of a building, that payment is to be made "when all the works are completely finished, and certified by the architect to that effect," a certificate that the contractors "have completed the mason work to your building" is sufficient.

(Before Bosworth, Ch. J., Moncrief and Robertson, J. J.)

Heard, February 7, 1862; decided, March 29, 1862.

THE plaintiffs in this action, James Stewart and John S. Howell, who were in partnership as builders, sued the defendant upon a contract which they had made with him in writing and under seal, by the terms of which the plaintiffs engaged, "on or before the first day of February, 1860, well and sufficiently to erect and finish the new building to be situated upon lot 88 Leonard street, in the aforesaid City of New York, agreeably to the drawings and specification made by Griffith Thomas, architect, and signed by the parties hereunto annexed, within the time aforesaid, in a good, workmanlike and substantial manner, to the satisfaction and under the direction of the said architect, to be testified by a writing or certificate under the hand of the said architect, and also, shall and will find and provide such good, proper and sufficient materials of all kinds whatsoever as shall be proper and sufficient for completing and finishing all the masons', bricklayers', plasterers' and other works of the said building, mentioned in the masons' specification, for the sum of eleven thousand four hundred dollars."

On the defendant's part it was stipulated that he should pay this sum in installments, at various stages of the work, and should pay the last installment, viz., "3,000 dollars when all the works are completely finished and certified by the architect to that effect. Provided that in each of the said cases a certificate be obtained and signed by the said architect."

The specifications annexed and referred to were entitled, "specifications for mason's work to be performed in building, erecting and finishing a five story store," &c., &c.

During the progress of the work the plaintiffs obtained from the architect his certificate as to the various install-

Stewart et al. v. Keteltas.

ments, the terms of which were, "This is to certify that Messrs. Stewart & Howell are entitled to receive the sum of twelve thousand dollars, on account, for mason work done to your building in Leonard street, agreeable to their contract."

The last certificate which they obtained, on completing the work, was in these words, "This is to certify that Messrs Stewart & Howell have completed the mason work to your building in Leonard street."

The defendant refused to pay the last installment; and this action being brought to recover the same, together with several items for extra work, the defendant in his answer denied that plaintiffs had performed the contract, and denied that they had obtained a certificate as required by the contract, and also denied the claim for the extra work; and he further alleged that by reason of plaintiffs' non-performance of the contract he had been delayed in the use of the building, and claimed to recoup or set off his damages therefor.

The plaintiffs in their reply alleged that the work was "substantially erected and finished and completed on or before the first day of February, 1860, and that it would have been entirely completed and finished on or before that date, but for the acts of the defendant and of the carpenters employed by him in the erection of such buildings, by which all the delay on the part of the plaintiffs to complete and finish at that date was caused and occasioned, and that such delay was not the neglect or fault of the plaintiffs."

The cause was tried before Chief Justice BOSWORTH and a Jury, on the 7th of June, 1861, and the plaintiffs recovered a verdict. Judgment having been entered the defendant now appealed therefrom, and also from an order of Mr. Justice HOFFMAN refusing to grant a new trial, which the defendant had previously applied for.

C. Bainbridge Smith, for defendant, appellant.

. L The verdict is against evidence. There was no dispute

Stewart et al. v. Keteltas.

upon the fact as to the amount of damages the defendant sustained in consequence of the plaintiffs not fulfilling their contract, and the Jury had no right to disregard them.

II. The several exceptions to the admission of the plaintiff Stewart's testimony, it is submitted, are well taken.

III. According to the contract on which the plaintiffs base their right to a recovery in this action, the defendant agrees to pay the plaintiffs a certain amount of money upon the condition of their strictly performing the covenants and agreements on their part. One of the covenants requires the plaintiffs to erect a certain building agreeably to the drawings and specifications made by the architect, within the time mentioned, in a good and workmanlike and substantial manner, to the satisfaction and under the direction of the architect, to be testified by a writing or certificate from him. The requirements of the certificate are distinctly specified, and its production and delivery to the defendant is a condition precedent to the payment of any moneys under the contract. (*Butler v. Tucker*, 24 Wend., 447; *Smith v. Briggs*, 3 Denio, 73; *Smith v. Brady*, 17 N. Y. R., 173; *Bonesteel v. The Mayor*, 22 N. Y. R., 164; *Bloodgood v. Ingoldsby*, 1 Hilt., 388; *Milner v. Field*, 1 Eng. L. and Eq. R., 531; *Glenn v. Leith*, 22 Id., 489; *Grafton v. The Eastern Co. R. Co.*, Id., 557.)

1. A condition precedent must be strictly performed to entitle a party to recover. (Cases above cited; *Pike v. Butler*, 4 Comst., 360; *Oakley v. Morton*, 1 Kern., 25; *Mounsey v. Drakes*, 10 Johns., 27.)

2. The certificate given is insufficient, and unlike any of those previously given. He had given for the other installments, certificates acceptable to the defendant, and the last one was more important than all the others; and there is no reason or excuse shown, either by the pleadings or proof, why the defendant was not furnished with the requisite or usual certificate for the last payment. The question is not whether the work was completed or not. The certificate is a condition precedent to any right to the payment claimed, or to an action for its recovery, and

the covenant requires a strict performance of what the plaintiffs had engaged to do. (*Smith v. Briggs*, 3 Denio, 73, and cases above cited.)

J. M. Van Cott, for plaintiffs, respondents.

I. The contract having been fully performed (though after the stipulated time) with the defendant's assent, the delay was immaterial, except as to the question of damages under the counterclaim. The plaintiffs' right of action for the \$3,000 installment and for the extra work, was, therefore, perfect. (*Smith v. Brady*, 17 N. Y. R., 174, 189, 190; *Mead v. Degolyer*, 16 Wend., 634, 636, 638, 639; *Dubois v. Del. & H. R. R. Co.*, 4 Id., 285; *Jewell v. Schroepfel*, 4 Cowen, 564; *Linningdale v. Livingston*, 10 Johns., 36; *Raymond v. Bearnard*, 12 Id., 274; *Jennings v. Camp*, 13 Id., 94, 97; *Wolfe Exr. v. Howes*, 20 N. Y. R., 197; *Cunningham v. Jones*, Id., 486, 489; *Champlin v. Rowley*, 2 Parsons on Contr., 39, 40; Add. on Contr., 197, 198, 763 (ed. of 1847); *Champlin v. Rowley*, 18 Wend., 191.)

II. The plaintiffs are entitled to recover for the extra sheath-piling.

1. Though within the verbiage of the contract, the acts of the parties show that it was not within the *plan and specifications* which qualify and restrict the mere words.

2. The defendant had misled the plaintiffs by an unintentional misstatement of the facts respecting the improvement of the adjoining premises. The plaintiffs had the right to stop until the error was corrected, and such right was a good consideration for the express contract to pay \$200 for the extra sheath-piling.

The consent to delay the excavation with a view to the adjoining improvements — such delay being at the request and for the benefit of the defendant — was also a good consideration for the express promise. (*Young v. Hunter*, 2 Seld., 203.)

3. And the defendant was bound by the architect's construction, under the fifth clause of contract, making this work extra.

Stewart *et al.* v. Keteltas.

III. The delay to complete by the 1st of February, was occasioned by defendant and his servants, and disentitled defendant to claim performance at the stipulated time.

Any act of the defendant delaying the plaintiffs in the completion of the work *ipso facto* waived the *condition* as to time. Thenceforth, the only obligation of the plaintiffs was to complete their work within a reasonable time. (*Young v. Hunter*, 2 Seld., 203; *Smith v. Trowsdale*, 77 Eng. Com. L., 83.)

IV. New trials are not awarded for the recovery of nominal damages. (*McConihe v. N. Y. & E. R. R. Co.*, 20 N. Y. R., 495.)

In any view of the case, the defendant did not lay a foundation to recover more than nominal damages.

V. The judgment should be affirmed. (See also *Thornhill v. Neats*, 98 Eng. Com. L. R., 831; *Holme v. Guppy*, 3 Mees. & W., 387; *Carpenter v. Blandford*, 8 B. & Or., (15 Eng. Com. L., 575.)

MONCRIEF J. The verdict of the Jury is conclusive, unless clearly against the weight of evidence. I confess my inability, in any case proper to be submitted to a Jury to determine between conflicting statements made at a trial, to perceive the propriety of reviewing the finding, upon the ground that the twelve Jurors arrived at a conclusion not warranted by the evidence. If the evidence is so preponderating in favor of either party that the Jury would err in not finding in his favor, it might be the duty of the Court so to instruct them,—most certainly it is the privilege of the court to so comment upon the evidence as matter of opinion. To submit a question in dispute to a Jury to settle which party is correct in the statements made, and yet practically to hold the rule of law to be that if they find other than one way the verdict will be set aside, I cannot regard as correct.

In the present case there was a conflict of testimony as to the cause of the delay; whether occasioned by the defendant or the plaintiff. The Jury found in favor of

Stewart et al. v. Keteltas.

the plaintiff, and I am not disposed to differ from their finding ; there is abundant evidence to support it. (1 E. D. Smith, 85, 89.)

The exceptions taken to the testimony of the plaintiff Stewart had reference to conversations with the defendant, and tended to establish a material issue between the parties ; the certificate provided for in the contract to be given by Mr. Thomas, the architect, was not to be conclusive upon the defendant. While a certificate was a condition precedent to the right of the plaintiff to demand payment, it by no means precluded the defendant from claiming or showing that the work had not been done or was imperfectly or improperly done.

The contract provides that \$3,000 dollars shall be paid by the defendant, "when all the works are completely finished and certified by the architect to that effect." It is not disputed that the works were all completely finished at the time Mr. Thomas, the architect, gave the certificate in question. The architect certified that the plaintiffs "have completed" the mason work. The contract of the plaintiffs was for the mason's work.

If the certificate given by the architect did not, in very terms, follow the words of the contract between the parties, it contained the substance thereof ; and it should be borne in mind that this certificate is prepared and delivered by the agent of the defendant ; it is not unjust to say that if the criticism of his counsel upon this certificate could be considered as well founded, the architect would have declined to give a certificate. A certificate insufficient in form, or defective in something that the contract calls for, is such an omission or inadvertence as should be indulgently regarded. (COMSTOCK, J., 17 N. Y. R., 173.) If it was imperfect the error originated with the agent of the defendant ; it could have been returned to the plaintiffs, with the nature of the objection pointed out ; if received without objection, or received without stating that the refusal to pay was upon the ground of some specified defect, it must be held to conform to and answer the

Stewart et al. v. Keteltas.

requirement of the contract; the defendant could waive defects, if any there were in the certificate. (2 Greenl. on Ev., § 394; 20 Pick., 389.) There was evidence tending to show that he made no objection to the certificate. The objection to payment was put upon the ground of damages sustained by non-performance at the time fixed by the contract. By the terms of the contract it is provided that "should any dispute arise between the parties, respecting the construction or meaning of the drawings and specifications, the same shall be decided by Griffith Thomas, architect, and his decision shall be final and *conclusive*." A dispute did arise concerning the "*sheath-piling*," and the defendant referred the plaintiff to Mr. Thomas, promising to pay \$200 therefor if he should so determine. Mr. Thomas decided that the work was extra, beyond the contract, and that the defendant should pay.

The charge of the Judge fairly submitted the whole case to the Jury, and containing no misstatements of the rules of law, the evidence supporting the verdict, and none of the exceptions being well taken, the judgment and the order denying the motion for a new trial, should be affirmed.

ROBERTSON, J. The contract, in this case, was under seal and *inter partes*; the only parties to it were the plaintiffs and defendant. By it, the plaintiffs covenanted that they would, on or before the 1st of February, after it was executed, "*erect and finish a new building * * upon lot 88, Leonard street, * * agreeably to drawings and specifications made by Griffith Thomas, architect,*" signed by the parties and thereto annexed, "*in a good, workmanlike and substantial manner, to the satisfaction of such architect,*" and would "*find and provide such good, proper and sufficient materials of all kinds whatsoever, as should be proper and sufficient for completing and furnishing all the masons, bricklayers, plasterers and other works of the said building, mentioned in the mason's specifications.*" The defendant only covenanted by it to pay the specified price, by installments, as the work advanced.

, There were also some other stipulations in such contract, to the effect that all work exhibited on either the drawings or specifications, should be done without extra charge; that the plaintiffs should provide all the materials, labor, scaffolding, implements, moulds, models and cartage. Provision was also made in it for compensation for extra work, the decision of any controversy by the architect, and saving the defendant from responsibility for loss or damage to the works or materials.

The specifications annexed to such contract provide for furnishing materials and doing work on various parts of the building, including excavations, removal of rubbish, filling up, mortar, sheath-piling, shoring, base courses, cement, vaults, cesspools, work of brick, brown stone, blue stone, marble, granite and iron, flagging, shutters and railings of iron, and plastering; no mention is made therein of any wood work, except that the first and second floors are required to be elevated from front to rear a certain height, the foundations to be leveled to the height of the cellar floors, enough strong iron anchors are required to be provided for floor and roof-beams, as directed, and cellar floors are to be deafened.

There is not a word in the whole contract or specifications tending to show that any wood work was necessary to be done to enable the plaintiffs to complete the building or the mason, iron, and plastering work, as they undertook it. No testimony in the case establishes that the work undertaken by the plaintiffs could not have been done without the aid of any carpenters' work; and although not having knowledge enough judicially, or otherwise, of the art of building houses, to pronounce positively whether it could or not, from the contract and specifications I should be rather inclined to think it could.

The plaintiffs' work was not completed within the designated time, and notice was given to him by the defendant that he held him responsible for his neglect. Damages for the delay are claimed in the answer, and the plaintiffs in their reply set up a proximate and substantial com-

pletion of the work by the time fixed, and that the delay was caused by the acts of the defendant and the carpenters employed by him in erecting such building.

The only testimony in regard to delay was that of one of the plaintiffs, the mason, blacksmith and plasterer, in their employ, and the architect; the first claimed a delay of five or six weeks by a refusal or neglect of the defendant to sheath-pile an adjacent lot, which, by the terms of the contract they were bound to do, and for which the defendant ultimately agreed to pay; also a further delay of a week or ten days by the failure of the carpenters employed by the defendant to put on part of a tier of beams, as the wall for supporting the ground floor was completed. He testified that "the mason work *was finished*" "about the 20th of November, there was some *little* to do "with the plastering after that; it became very cold "weather in the month of December and the plastering "was interrupted by it." He then proceeded to explain such interruption by stating "that, from that time there was "no mason-work to do of *any consequence*. * * About "the 1st of January *the plastering was finished, all that "could be finished*, with the exception of some which was "to be done in the vault which was altered after the first "of January,—some little plastering which could *not have "been done* previous to that." The only work which he could specify as remaining to be done after the 1st of February was a dumbwaiter and platform, which were delayed by the alteration in the vault until the 20th of February, after which nothing was done except stopping leaks, and he stated that the work was substantially finished at that last day. He did not venture to claim the delay in the plastering as being due to any neglect of the carpenter or even to assert under oath that he could not have completed the work by the day fixed, notwithstanding the delays; his mason, however, charged more boldly the delay in the plastering upon the carpenters; he testified that "it was necessary to have the stairs up before he "completed the plaster work and likewise the windows in

Stewart et al. v. Keteltas.

"at that time of the year: the stairs were not up nor the windows in; we got the brown coat on on the 21st of November; we were delayed with the other work till the 16th of December." He, however, further stated that "patching and repairing is a necessary part of the work; the carpenters, gasmen and plumbers are very likely to break a part of the wall; * * we were delayed in the cold weather on account of the windows not being in; if they had been in, the cold would have been kept out." He does not venture to state that the delay caused by the carpenters rendered it impossible for the plaintiffs to complete the work by the day fixed in the contract, and his idea of the word "necessary" seemed to be that the carpenters' work, being put on after plastering, would break it, and that the want of windows made the mortar freeze. His employer does not seem to have attributed the same consequences to the same cause of delay. A blacksmith employed by the plaintiffs testified that he was interrupted in his work, by want of being furnished with the dimensions of inside iron shutters by the carpenters. The architect, however, testified that he could have got his proportions from what was done, and further testified that the carpenters' work, on which the masons' work depended, was not, and could not be finished before the 1st of February "because there were some parts of the iron and plaster work that had to be done at that time in connection with the carpenters' work, but not a particle of iron work, which depended upon carpenters' work." A plasterer testified that he got through with the necessary patching about the beginning of February. Other evidence in the case established that the building was not surrendered to, and taken possession of by the defendants as complete, and the architect's certificate given, until the end of March.

No witness pronounced the completion of the plaintiffs' contract in time, an impossibility, notwithstanding all the delays, and the only inference, to be fairly drawn from the testimony, was, that a little extra exertion, or a few more hands, would have enabled the plaintiffs to have finished

Stewart *et al.* v. Keteltas.

their labors by the 1st of February, as all that remained was patching the plastering, particularly, as they do not seem to have proceeded with indefatigable diligence in completing the work to be done by them, having delayed the carpenters on their work.

The question, therefore, arises whether, unless the delays produced by other workmen rendered it impossible for the plaintiffs to complete their work in time, they are excused for not doing so. In *Holmes v. Guppy*, (3 Mees. & W., 387,) it was admitted on the trial that the delay in giving possession rendered it impossible to complete the contract in time, and the decision was put on that ground. In *Thornhill v. Neats*, (8 Com. Bench N. S., 831,) it was pleaded that the doing of additional work was so mixed up with the contract work, and formed part and parcel thereof, as to render it impossible to complete the work within the time. WILLIAMS, J., doubted if the pleading was good in equity, for not averring that the rest of the work was done in time, and KEATING, J., held that the subsequent agreement prevented performance. It is very evident that such a contract cannot be interpreted into one to erect a building by a certain number of days' work, so that if the builder is prevented, by the delays of other workmen, from going on with his work, he is to be excused; if such be the law, the delay of an hour would be sufficient to make it a contract at large, as laid down in *Thornhill v. Neats*, (*ubi sup.*): Every one who contracts to do a work by a certain day, is bound to do it, unless it is rendered impossible by the acts of the party to whom he is bound; a mere temporary hindrance is not sufficient, although he may recover damages therefor.

If, therefore, the plaintiffs were bound to make out that the delays of the defendant and his workmen had rendered it impossible for them to complete the building by the stipulated time, (and there was no direct evidence that they had produced such a result in this case, or even of the period indispensably necessary to finish the mason and iron work of such a building,) it is plain no data were

Stewart et al. v. Keteltas.

furnished to the Jury, from which legally and properly to infer that the defendant or his agents had deprived the plaintiffs of the power of complying with their obligation; and mere evidence that they had been delayed six, eight or ten weeks in the performance of their work, would not alone, without such other evidence, assist the Jury in coming to a correct conclusion, whether or not such delay rendered the work impossible within the allotted period; it would be as much a matter of conjecture for them as if this Court were now to pronounce upon the effect of such delay. In this case, too, the plaintiffs made no complaint to the defendant of any delay except the sheath-piling at the beginning, for which he was not responsible, and they only bring up such delays now as an excuse, after failing to perform their contract.

It is true, no request was made to the Court to instruct the Jury, that, there being no evidence to show that the delays proved had rendered it impossible for the plaintiffs to complete the building by the first of February, they were to disregard it in determining the defendant's right to recover. Nor did the learned Judge charge that they were at liberty to determine, in reference to such claim, whether such delays had put it out of the power of the plaintiffs to perform; but he instructed them that the plaintiff was liable, "if he had not shown that he was prevented by the carpenter from completing his work by the stipulated time," thus strongly implying that if he had so shown, he was not so liable. He had previously charged: "*that a failure of the carpenters to do what was indispensable to the progress of the work in the contract was the same thing as a delay or prevention of the plaintiffs from performing it by the stipulated time, in consequence of the act of the defendant or the carpenters employed by him,*" and that, "*if the delay was such as to throw the completion of the work beyond the first of February, the plaintiff was entitled to recover.*"

This instruction certainly does not conform to the views before urged, and the learned Judge seems to have fallen

into the error of supposing either that the time consumed in the delays was necessarily to be added to the period allowed in the contract, so as to allow the plaintiffs additional time, or that the Jury were at liberty, without any proof of the time indispensably necessary for the work, to infer that such delays took away all power from the plaintiffs of completing their contract within the time, and rendered it a physical impossibility, by any reasonable diligence to do so; with all due respect, I have been unable to bring myself to that conclusion. It was an error even in regard to the plaintiffs' right to recover, which, although fatal to the present verdict, might be immaterial on a new trial, because there was strong evidence of waiver as to that; but it certainly misled the Jury as to the defendant's recoupment, who established, by uncontradicted evidence, damages from the delay in completing the building.

There seems to me also another error in the disposition of this case. The contract was under seal, and must be construed according to the legal interpretation of the language contained in it; not a word is said in it of any obligation by the defendant to do anything but pay the installments of the price as they become due; nothing is said of any carpenters' work to be done to the building. The obligation of the plaintiffs is simply to do a certain amount of work, or complete a certain building by a certain day, and they undertake to furnish all the instruments, implements, and utensils by which that work is to be done; and it is now proposed to insert in the instrument an implied condition to qualify the plaintiffs' obligation, to wit: "that the defendant shall employ carpenters and "other workmen, to convert such building or enclosure "into a store, and that such workmen shall proceed to "do all the work to be done by them, with such diligence "as to facilitate to the utmost the completion of the work "undertaken by the plaintiffs within the time allotted." These are plainly the terms of the condition, for this doctrine must proceed upon the theory or presumption of law

that the plaintiffs have taken the minimum or shortest possible limit for doing the work, and that any delay, however brief, deprives them of the power of doing it within that time; in other words, that the plaintiffs are entitled to find, at every stage of their work, the moment they have completed it, every succeeding operation of the carpenters completed in the time in which it could have been done by reasonable diligence, otherwise that they are discharged by any delay of any considerable duration beyond that.

I assume that it will not be contended seriously that any mere delay of the carpenters in facilitating the progress of the plaintiffs' operations, is equivalent, in its effect on the plaintiffs' liability, to a positive obstruction to them, such as the taking away the possession of the ground from the builders by the owner would be. A refusal to furnish facilities can never be equivalent to a positive hindrance, unless by the terms of the contract such facilities are the only ones to be employed; the principle, therefore, contended for by the plaintiffs' counsel cannot proceed upon the ground that the defendant interposed obstacles, because they themselves could have employed carpenters to do the neglected work.

I am unable to perceive how an undertaking to complete a specified piece of work by a specified time can be hampered, by construction, with the condition that the person for whom the work is to be done shall furnish any facilities for doing it; there is no rule of interpretation invoked to sustain it, but merely, that carpenter work being necessary, the defendant was bound to furnish it, and the contract must be so construed. I understand that a person who undertakes to do anything, undertakes thereby to do all things necessary to enable him to complete it, even to the surmounting of impossibilities, or to be responsible in damages for not doing so. There is no special privilege allowed to a builder's contract, which makes it an exception, and renders all the precise terms of it, as regards the builder's obligation, nugatory, but

imposes duties not specified or alluded to in it; on the owner. The Court clearly can take no judicial cognizance of the necessity of carpenter work to enable a mason to complete his work, and if it could do that, it could not assume that the onus of supplying it lay upon the owner, who merely covenanted to pay the price.

It is true it may be said that such a construction would involve a great hardship upon the plaintiffs, because they would then be bound to find carpenters, or build without their assistance; that may be so, but the Court would not be bound to relieve from the consequences of an undertaking deliberately entered into, by grafting qualifications to make the hardship less. But this is rather an imaginary than a real evil. In this case, carpenters were employed by the defendant, who undoubtedly preferred having that work done, to leaving the plaintiffs to complete their work without it, as they had a right to do. This was what the plaintiffs relied on, to wit, the interest of the defendant, and not on any absolute obligation of his to furnish carpenters' work. They, as well as the defendant, took the risk of such carpenters doing the work within the time agreed on, so as to enable them to complete their contract within that time, and are not now to throw the whole responsibility on the latter. Suppose the owner of a lot of land makes two separate agreements with a mason and carpenter, to finish their part of the work of a building by a certain day, and either of them finished his work by that day, but does it in such a manner as to delay the other beyond the day, could the owner sue for damages by reason of that delay? Is there anything in this contract enabling the defendant to sue the plaintiffs for damages in delaying the carpenter? If there is, I have been unable to find it, and if not, is not the owner entirely at the mercy of contractors, in regard to delays?

But it may be proposed to modify such proposed condition further, by inserting in it, that the defendant shall cause the carpenters' work to be done from time to time, on request of the plaintiffs, because it may seem hard that

Stewart et al. v. Keteltas.

the owner, after making his contract, should be compelled constantly to watch the progress of the building to see that each contractor did his duty to the other,—that not a moment's time was lost in putting beams on the walls or walls over the beams. If so, as the defendant was never applied to, except in regard to the sheath-piling, the plaintiffs can only sustain their case by making the carpenters the defendant's agents; and this certainly they cannot do; a mere contract with them to do certain work, does not make them agents, to bind the defendant, to discharge the plaintiffs from the performance of their covenant; there is nothing in the contract in question to make them so; and it would certainly be a liberal interpretation of it to hold that it not only made it incumbent on the defendant to employ carpenters, but that every carpenter so employed by him was an agent, notice to whom, by the plaintiffs, should be equivalent to notice to his principal; if so, on a similar contract with the carpenters, the plaintiffs would be the defendant's agents, and the conduct of or conversation between the two contractors might give away rights of the defendant more valuable than the lot on which the building was erected.

I therefore am clearly of the opinion that neither any rule of interpretation of sealed instruments nor the nature of the contract, warrants the interpretation of the condition in question, by which the plaintiffs' obligation to do their work within the time fixed, is made to depend on due diligence of the carpenters to be employed by the defendant, so that a delay by the latter, although not rendering the plaintiffs' work impossible to be performed within the time, should excuse them from such performance. And without such condition, I am still more clearly of opinion that without the slightest evidence to establish the impossibility of the plaintiffs completing such work within the time, notwithstanding the delays, the plaintiffs were not excused from performing the work, nor the defendant debarred from damages for its non-performance.

Stewart *et al.* v. Keteltas.

The judgment should be reversed and a new trial had, with costs to abide the event.

BOSWORTH, Ch. J. My brother MONCRIEF thinks the judgment should be affirmed, and my brother ROBERTSON is of the opinion that none of the exceptions taken by the defendant are tenable. But he thinks the defendant should have a new trial on the payment of costs, on the ground that, in his judgment, portions of the charge are erroneous, and were calculated to mislead the Jury. The Judge charged, that if there was a delay or interruption of the work of erecting the building "resulting from the omission of the carpenters to do what was essential to enable the plaintiffs to proceed with their work, and if that delay was such as to throw the completion of the work over the first of February, then the plaintiffs would be entitled to recover, being prevented from completing their contract in time, by the act of the defendant, or his carpenters."

This charge makes the delay or omission of the carpenters to do the work essential to enable the masons to proceed with the masons' work. equally an excuse as a delay caused directly by the defendant in person, and charges him with the consequences of their default, to the extent, that if the plaintiffs were prevented thereby from performing their contract within the stipulated time, they are deemed to have been prevented by the defendant.

The defendant did not except to this instruction, nor has he made any point on this appeal which suggests that it is erroneous.

It is quite clear from the terms of the contract itself, that the plaintiffs only contracted to do the masons' work mentioned in the specifications annexed to their contract, and to furnish the materials necessary therefor.

As between the plaintiffs and the defendant, the latter was to do or procure others to do the carpenters' work. The masons' work could not be completed, unless the carpenters' work was performed *pari passu*.

If, when the masons' work had progressed so far as to be in readiness to receive the first tier of beams, it should be ascertained that no carpenters had been employed to do the carpenters' work, or, if there had been, that they had failed and refused to go on with their contract, the defendant could not take the position that he would not employ other carpenters, and that the masons should go unpaid for what they had done, unless they completed their contract by the stipulated time, which would be a physical impossibility, no carpenters' work being performed.

The masons are not parties to the carpenters' contract, and may not know who are to have it, at the time their own is executed. The only parties to the carpenters' contract, are the carpenters and the owner. If they break it and cause damage to the owner, his remedy is an action against them. And the same is true of the masons' contract. If both are in default, and thereby severally cause damage to the owner, he has his remedy against each. But a breach by the carpenters of their contract with the owner, by which the completion of the building is delayed beyond the stipulated time, and the masons are prevented from making strict performance, cannot be the foundation of an action by the owner against the masons, nor work a forfeiture of their right to recover for what they have done under their own contract.

A contrary rule, would not only prevent the masons, who had progressed with their contract with the utmost despatch, and who, but for the default of the carpenters, would have completed it in time, from recovering any unpaid installments, but make them liable to the owners, for damages for not completing it by the contract time, although the failure to complete it was caused entirely by the conceded default of the carpenters. This would make them guarantors, that the carpenters should perform their contracts with the owner, with all reasonable diligence and despatch.

I am quite clear that there was no error in the part of the charge now under consideration, nor in the admission

Stewart et al. v. Keteltan.

of evidence to show that by the fault of the carpenters the plaintiffs were delayed in the prosecution of their work. (*Holme v. Guppy*, 3 Mees. & Wels., 387; *The Great Northern Railway Co. v. Harrison et al.*, 14 Eng. L. & Eq., 189; *Thornhill v. Neats*, 8 Com. B., N. S., 831; *Young v. Hunter*, 2 Seld., 206, 207; *Goodwin v. Holbrook*, 4 Wend., 377.) The plaintiffs are excused for any delay caused by the omission of the defendant to do an act which necessarily precedes performance by the plaintiffs, and without the doing of which, performance by them is a physical impossibility, where, by the necessary import of the agreement between the parties, the obligation rests on the defendant to do such act, or procure it to be done. (*Knight v. Waterworks Co.*, 2 Hurls. & Norm., 6.)

There being no error in the instruction now under consideration, should a new trial be granted on the ground that the evidence was insufficient to warrant the Jury in finding that the plaintiffs were prevented by the carpenters from proceeding with and completing the work by the stipulated time?

The plaintiff, James Stewart, testifies to a delay of "a week or ten days," by the refusal of the carpenters to put on the first tier of beams, as is usually done in erecting buildings of this size. This occurred the last of July or early in August. George Stone testifies to a delay from the 21st of November to the 16th of December, caused by the omission of the carpenters to put up the stairs and put in the windows.

On this evidence, the Court cannot hold, that the verdict is clearly contrary to evidence, or that it is not warranted by it. The Judge before whom the motion for a new trial was heard at Special Term, held the verdict could not be disturbed on the ground of its being against evidence.

Neither of the carpenters was sworn to contradict the evidence, given in respect to the delay caused by them, although one of them was present at the trial.

As to the item of \$200 for sheath-piling, on the westerly side of the building in question: there is no substantial

conflict between the evidence of the plaintiff, Stewart; the defendant; and Thomas, the architect.

Stewart testifies, that, in consideration of making his contract \$11,400, instead of \$11,600, Keteltas would warrant that the store on the west side would be built forthwith. This would render sheath-piling on that side unnecessary; the owner of that lot did not build on it, and sheath-piling became necessary. The plaintiffs delayed commencing their work, on that account, upon consultation with, and by the approval of, the defendant, in the hope that the owner of that lot would build on it, and thus save the expense of sheath-piling. The defendant does not deny having the conversations to which Stewart testifies. He says, "it was a doubtful question whether, by the contract, I was not bound" to pay for it; "I told him so, and I said, if you think you are entitled to it, I would rather pay it, if Thomas says so. * * Thomas consulted me about that matter; he said the work was delayed. I told him, in any event, to have the sheath-piling, if the building was delayed."

Thomas says: "I presume Stewart may have waited for the excavation of the vault on the west side, two or three weeks, but he was to give me notice when he could not wait any longer, &c. * He did so. I went immediately to Keteltas the same day, and told him; then he gave me orders to let Stewart have the sheath-piling done immediately, and to specify the price for doing it. Stewart did it; it was \$200. I think he commenced next day or the day after, with the sheath-piling, and it was urged along with all practicable dispatch."

It may be said of this branch of the case, that after the contract was executed, and after it was ascertained that sheath-piling on the westerly side would be necessary, a question arose between the parties in relation to it, and who was to bear the expense of it. That question was finally settled by the defendant promising to pay the plaintiffs \$200 for doing it, and they, relying on this promise, did it. I think this subsequent action of, and agreed-

Stewart et al. v. Keteltas.

ment between, the parties, does not leave the defendant at liberty to insist that the written contract required the plaintiffs to do it at their expense.

As to the final certificate of the architect, in the case of each payment prior to the last, a certificate was produced, on which the defendant paid, without objection, and no question can arise as to their sufficiency.

By the contract, the last payment of \$3,000 is payable "when all the works are completely finished and certified by the architect to that effect." The certificate given is, "that Messrs. Stewart & Howell have completed the mason work to your building in Leonard street."

"Complete," in common parlance, means "having no deficiency, perfect," and the verb, to complete, means "to finish, end, perfect." (Web. unabridged.) It fairly imports that the building was completed to the satisfaction of the architect, as he gave the certificate, and also, that in his judgment, it was completed in accordance with the plans and specifications. The contract does not require that the certificate shall contain the words, "the works are completely finished." Any words, of clearly equivalent import, are sufficient. The completed building, includes "the works," and when it was completed, according to the ordinary acceptation and meaning of that word, it was completely finished;—completely, means, "fully, perfectly, entirely." That it was, in fact, finished in every respect, according to the contract, when the certificate was given, is free from doubt. The architect testifies that "the mason work was completed from the 15th to the 20th of March." I think, therefore, that there is no defect in the terms of the certificate, which is an answer to this action.

My conclusion is, that there is no ground which will justify the Court in interfering with the judgment, and that it should be affirmed.

MONCRIEF, J., concurred in this opinion. Judgment affirmed.

ROBERT M. HENNING, survivor, &c., Plaintiff and Appellant, v. THE NEW YORK AND NEW HAVEN RAILROAD COMPANY *et al.*, Defendants and Respondents.

1. The possession, by the transfer agent of a corporation, of the transfer books of its stock, and his authority to allow them to be used, do not constitute the *indicia* of an authority to make representations as to the ownership of stock, so as to render the company liable for the falsity of such representations made by him.
- 2 Nor does mere permission, given by the agent, to enter upon such books a transfer of reputed stock, there being no new certificate given, amount to a representation by him that the person making the transfer was the owner of any genuine stock.

(Before ROBERTSON and WHITE, J. J.)

Heard, March 11, 1862; decided, April 12, 1862.

THIS action was brought by John O. Woodruff and Robert M. Henning, against the New York and New Haven Railroad Company, Luther O. Clark, Edward Dodge, Joseph W. Clark, Jay Cooke, Thomas P. Huntington and John D. Maxwell, to recover for fraudulent representations which plaintiffs alleged had been made by the defendants, through their transfer agent, Robert Schuyler, and involved the question as to the liability of the company on account of the spurious stock issued by Schuyler. The facts relative to this transaction fully appear in the *Mechanics' Bank* case, 4 Duer, 430, and 13 N. Y., 599.

It appeared on the trial, in substance, that on the 23d June, 1854, E. W. Clark, Dodge & Co., as agents of the plaintiffs, doing business under the name of Woodruff & Co., were applied to by Gouverneur Morris for a loan of \$20,000 on a certificate for two hundred and seventy shares of the company's stock, dated that day, (being one of Schuyler's fraudulent issues,) and that upon the faith of it, and after insisting that the stock should be transferred to them on the books prior to making the loan, they agreed to make such loan for sixty days, without any knowledge of the true character of the certificate, and believing it to

Henning v. New York & New Haven Railroad Company *et al*

be genuine. The stock was duly transferred into the name of E. W. Clark, Dodge & Co., the same day, by the usual transfer, executed in the office of the company, the transaction being superintended and consented to by the usual clerk in the transfer office, but no new certificate was taken out. The loan was then made, and Morris not having repaid it, and the company having declined to recognize the certificate or to admit the right of the plaintiffs to the stock, this action was brought, claiming that the company was liable in an action on the case, for the fraud of Schuyler in inducing the loan upon the faith of the false and fraudulent certificate and transfer of the two hundred and seventy shares.

The cause was tried at a Special Term, held by Mr. Justice WOODRUFF, without a Jury, on the 14th of January, 1860, and a decision was rendered in favor of the defendants, dismissing the complaint, with costs; the Court holding that the case came within the principles declared by the Court of Appeals in the case of the Mechanics' Bank against the same defendants, (13 N. Y., [3 Kern.] 599.)

After judgment had been entered, the plaintiff, Woodruff, died, and the action was, by order of Court, continued in the name of Henning, as survivor, and he took the present appeal from the judgment.

Walter Rutherford, for plaintiff, appellant.

I. The principal is liable, civilly, to third persons for the frauds, &c., of his agent in the course of his business, although the principal did not authorize or know of them. (Story on Agency, 555, § 452, and cases cited; 2 Strange, 653.)

II. These corporations act wholly by agents. As a necessary correlative to the principle of the exercise of corporate powers by representatives, is the recognition of a corporate responsibility for their acts. For acts done by their agents, either *in contractu* or *delicto*, in the course of its business, and other employment, the corporation is responsible. (*Yarborough v. The Bank of England*, 16 East,

Hanning v. New York & New Haven Railroad Company & al.

6; *Eastern Counties Railway v. Broom*, 2 Eng. L. & E., 406; *Philadelphia, Wilmington & Baltimore Railroad Company v. Quigley*, 21 How. [U. S.], 207; *National Exchange Co. of Glasgow v. Drew*, 2 Macqueen, House of Lords Cases, 103; *S. C.*, 32 Eng. L. & E., 1.)

III. Where one of two innocent parties must suffer by the misconduct of another, the party who intrusted that other should bear the loss. (Judge DENIO, in the case of *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 4 Kern., 624.)

IV. Where a false representation is made knowingly, to which another gives credit, and damage is suffered, he has a remedy by action against the person who has made the representation. (*Zabriskie v. Smith*, 3 Kern., 323; *Mechanics' Bank of Brooklyn v. Townsend*, 17 How. Pr., 569; *Cross v. Sackett*, 6 Abb. Pr., 247; *National Exchange Company v. Drew*, 32 Eng. L. & E., 4; *Gerhard v. Bates*, 20 Id., 130; *Denton v. Great Northern Railway*, 34 Id., 154.)

V. Schuyler was the president and director of the defendants, and their sole and only transfer agent in New York. He alone, in New York, could make representations on behalf of the company, as to who, by the books of the company, were the stockholders; in no other way could third persons possibly ascertain that fact. It was directly within the scope of his authority, and within the defined limits of his duty. The company held him out as competent to be trusted, and thereby, in effect, warranted his fidelity and good conduct in all matters within the scope of the agency. (*Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 4 Kern., 624; 16 N. Y. R., 126; *Stoney v. American Life Insurance Company*, 11 Paige, 635; *Hern v. Nichols*, 1 Salk., 289; *North River Bank v. Aymar*, 3 Hill, 262; *Thompson v. Bell*, 26 Eng. L. & Eq., 536; *Northrop v. Curtis*, 5 Conn. R., 246; *Ang. & A. on Corp.*, 588; *Bulkley v. Derby Fishing Co.*, 2 Conn. R., 252; *Oxford Turnpike Co. v. Bunnell*, 6 Id., 552; *Bank of Bengal v. East India Co.*, 2 Knapp P. O., 245; *Foster v. Essex Bank*, 17 Mass. R., 479.)

Henning v. New York & New Haven Railroad Company *et al.*

VI. When the purchaser of an instrument not negotiable wishes to exercise extreme caution, he will inquire of the maker, and procure his admission of its validity and his assent to the transfer, and having done so, an estoppel will arise in his favor, not because he has invested his money in the purchase, but because he purchased after procuring such admission or consent, and upon the faith thereof. In this case, the plaintiffs did procure from the defendant an admission of the validity of their shares, in the proper and authorized manner, from the agent intrusted by them with the transfer books of the company, who alone was authorized to make this admission entirely within the scope of his authority, and an assent from this agent to a transfer of the shares to them, and parted with their money on the faith of such admission and transfer.

VII. The act of Schuyler, in this case, was authorized by the by-laws, and the company is bound by the act, as to all persons dealing in good faith with the transfer agent.

1. It is incumbent on a corporation not to permit a transfer of stock until they are satisfied of a party's authority to transfer. (*Angel & Ames on Corp.*, 588; *Pollock v. National Bank*, 3 Seld., 274.)

2. The power to regulate the transfer of stock, was given for the security and benefit of the company.

3. The object of the Legislature in authorizing the company to make by-laws for the transfer of stock, was to give facility to its transfer. This facility of transfer is one of the advantages of this species of property; and would be entirely destroyed, if a purchaser should be required to look to the regularity of all previous transfers. (*Davis v. Bank of England*, 2 Bing., 393.)

4. The transferring the shares of the capital stock on the books of the company, is a matter of ordinary occurrence, and in the absence of any proof to the contrary, it may be fairly presumed that the principal officer, or clerk in attendance at the transfer office of the company, during the usual hours of business, is authorized to permit such a transfer. The charter of the company in the present

Henning v. New York & New Haven Railroad Company *et al.*

case having authorized the owners of stock to sell and transfer it on the books of the corporation, it is the duty of the directors to see that some proper officer of the company is usually in attendance, duly authorized to allow such transfers, when proper to be made, and it is no excuse to say, that they have neglected that duty. (*Com. Bank of Buffalo v. Kortright*, 22 Wend., 351.)

5. It is no excuse for the company, that the act of the agent was willfully or fraudulently done without the knowledge or consent of the company.

6. A corporation must act by agents. The authorized act of those agents within the scope of their authority is the act of the corporation. (*Bank of United States v. Davis*, 2 Hill, 451; *Corn Exchange Bank v. Cumberland Coal Co.*, 1 Bosw., 434; *Oldfield v. New York & Harlem R. R. Co.*, 14 N. Y. R., 310; *Weed v. Panama R. R.*, 17 N. Y. R., 362; *Blackstock v. New York & Erie R. Co.*, 20 N. Y. R., 48; *National Exchange Co. v. Drew*, 32 Eng. Law. and Eq. R., 9.)

VIII. The fact that the defendants are liable in this action has been judicially determined by a Court of competent jurisdiction upon this identical stock and transfer, upon the same facts, since the trial of this action.

William Curtis Noyes, for defendants, respondents.

I. The certificate given by Schuyler to Morris, dated June 23d, 1854, for 270 shares, was void. (*Mechanics' Bank v. N. Y. & N. H. R. R. Co.*, 3 Kern., 599; *N. Y. & N. H. R. R. Co. v. Schuyler*, 17 N. Y. R., 592.) These decisions have been followed by the United States Circuit Court, (NELSON J.) in *Illius v. The same defendants*.

II. There was no proof, nor did the Judge find, that any representation whatever was made by the company, or by its transfer agent, or any other of its officers, that Morris was, at the time, the owner or proprietor of the shares he assumed to transfer. Huntington, the clerk, was simply permitted to execute a transfer in the office of the company under the power given by Morris.

Henning v. New York & New Haven Railroad Company et al

III. Neither Schuyler, nor any clerk representing him had authority to make any representation binding upon the company in respect of stock or a certificate of stock, beyond the legal capital authorized by the charter of the company. As transfer agent, Schuyler had no other power than to make a certificate for lawful shares of the company, after an owner of them had duly transferred them to the person to whom the certificate was made; the making of such transfer being a condition precedent to the performance of any act by Schuyler.

IV. No estoppel against the company from the issuing of the certificate by Schuyler, or from the acquiescence of his clerk, in permitting a void transfer to be executed in his presence in the office of the company. Neither of them had any authority to do any act creating an estoppel in reference to the stock or certificates. (*Fairtile v. Gilbert*, 2 Durnf. & East, 171; *Day v. Green*, 4 Cushing, 433; *Howard v. Hudson*, 2 Q. B., 1; *Carpenter v. Stilwell*, 1 Kern., 73, 74; *Freeman v. Cook*, 2 Exch. R., 654; *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio, 157.)

BY THE COURT—ROBERTSON, J. The Referee has not found in this case that any certificate of stock was issued to Mr. Morris before the advance by the plaintiff's agents, and the evidence is clear that such advance was made immediately after, and solely on the faith of, the transfer on the books of the company, by Mr. Morris, to the plaintiff's agents. The only representation, therefore, by the company or any of its agents, of the holding of any stock by Mr. Morris, was that, if any, arising from the permission by the transfer clerk to him to transfer reputed stock, on a transfer book kept in the company's office. No subsequent recognition of that, by the issue of a new certificate, operated to deceive the plaintiff's agents before the advance of the money.

The case is, therefore, distinguishable from the case of the Mechanics' Bank against the present defendants, (3 Kern., 599,) solely by the fact that the transfer clerk of the

latter permitted an entry to be made in a transfer book kept in their office, of as much stock as was contained in the spurious certificate. It is true that case may not have gone the length of deciding that the company could not have authorized its officers and agents to bind it by representations as to the ownership of its stock by persons who, in fact, did not hold any, and thus become liable to those injured by reliance on such representations for damages sustained by them. But I understand the Court to have held, that the transfer agent, (Schnyler,) was not so authorized in fact, and that the company did not give him the appearance of having such authority, or hold him out to the world as having it, by placing him in the position of trust and confidence they did. The language of the prevailing opinion is: "The power of the agent to charge his principals, by doing a wrong, must be traced distinctly to his authority, *and it cannot be referred to an increased facility for imposing on the credulity of others, derived incidentally from his appointment to a situation of trust.*" This, of course, is entirely independent of the question whether the false statement was culpable or innocent.

The question of fact, therefore, arises in this case, whether the company, in fact, gave any power to the transfer agent or his clerk who had charge of the transfer book, to represent to any one, that another person owned shares of stock in the company. If not, the questions of law arise, whether the possession of the transfer books and authority to allow them to be used, constituted the *indicia* of an authority so to represent, and whether permission to Mr. Morris to enter a transfer on such books, and his subsequent entry, constituted such a representation. There was no evidence of any direct authority to make such representation. In the case already referred to, it was held that even the authority of the agent, who signed the certificates of stock, to do so, being limited by the necessity of actual ownership of such stock, by the person whom he therein certified to be the holder, such

Geary v. Page *et al.*

certificates were not sufficient to bind the company as a representation that such person owned it; and that all assumption that the agent appeared from his position to have such authority, was unwarranted. The same reasoning must apply to the possession of the transfer books; and an authority of the transfer agent to permit a transfer, accompanied with such possession, does not amount to such *indicia* of authority to certify to ownership of stock, as to fix a liability upon the defendants. Of course, if it does not, the mere permission to enter the transfer would not be equivalent to a representation that Mr. Morris owned the stock in question. Possibly the effect might have been different, had a new certificate been issued after the transfer on the faith of which the advance was made. But that is not this case.

The judgment, therefore, must be affirmed, with costs.

JOHN W. GEARY, Plaintiff and Respondent, v. DAVID D. PAGE *et al.*, Defendants and Appellants.

1. The plaintiff having a fund in the hands of the defendants, his bankers, directed them to place the same to the credit of accounts, to be opened by them for the purpose, in the names of his children, who were of tender years; but, after the defendants had done so, they continued to recognise the authority and directions of the plaintiff in the management of the fund, and it did not appear that he had been indebted to the children or had received any consideration upon the transfer of the credits, or that the children ever had notice thereof or received possession of the securities.

Held, that, notwithstanding such change in the accounts, the plaintiff could maintain an action in his own name, to recover from the defendants the balance due thereon.

2. The change in the accounts, under such circumstances, is neither a transfer of the fund or securities themselves, nor a gift *in presenti* nor *in futuro*. (Per MONELL, J.)
3. The defendants having failed in business while indebted to the plaintiff, set apart certain claims as security for the debt, and on compromising them, receiving in part cash and in part a promissory note, wrote to him that they had done so, and remitting the cash, and saying that these "must be received in full of your debt. * * * You will please send a proper discharge." The plaintiff replied, acknowledging the receipt of the remittance, and saying, "I desire this to serve you as a receipt until you forward me the balance and such releases as you desire me to execute."

Geary v. Page et al.

Held, that this was not an accord and satisfaction, and was no defense to plaintiff's action to recover the balance.

(Before all the Justices.)

Heard, March 8, 1862; decided, April 26, 1862.

THIS is an appeal by the defendants, Daniel D. Page and Henry D. Bacon, from a judgment entered upon the report of John O. Sargeant, Esq., a Referee, in favor of the plaintiff, against the defendants, on the 16th of May, 1861, for \$15,627.98.

The action was brought against Daniel D. Page, Henry D. Bacon, David Chambers, Henry Haight and Frank W. Page, copartners, doing business as bankers at San Francisco, to recover a balance of upwards of \$52,000, alleged to be due from the defendants to the plaintiff, for moneys collected and received by them from and for the account of the plaintiff. It appears that during the years 1852-3-4 and 5, the plaintiff deposited with the defendants large amounts of moneys, and securities, for collection and investment, and which, from time to time, were received, collected and invested by the defendants. The defendants denied any indebtedness, and alleged that all the collections and investments made by them, were as the agent of the plaintiff and at his risk. They further alleged, that from and after November 1st, 1852, the investments of the plaintiff's moneys in their hands, and the income and interest upon the same, were made, by the plaintiff's directions, in the names respectively of M. A. Geary, E. R. Geary and W. L. Geary, the plaintiff's children, who were minors. That thereupon the accounts between the plaintiff and defendants were closed upon their books, and thereafter they became debtors of said M. A., E. R. and W. L. Geary, respectively. The defendants further alleged, that in May, 1855, they placed in the hands of the defendant, Henry Haight, the note of Henry A. Lyons, for six thousand dollars, and six thousand dollars in cash, to be paid to the plaintiff, for and on account of E. R. and W. L. Geary, and that the same was received and accepted by

Geary v. Pago *et al.*

the plaintiff in full satisfaction and discharge of the indebtedness of the defendants to the plaintiff.

The Referee found, among other facts, that, by the direction of the plaintiff, a portion of the proceeds of the securities in the hands of the defendants were placed by them to the credit of accounts opened in the names, respectively, of M. A. Geary, W. L. Geary and E. R. Geary, and that the balance was ultimately transferred to an account opened in the joint names of E. R. and W. L. Geary, subject to the directions, orders and agreement of the plaintiff; that neither E. R. nor W. L. Geary was ever in possession of any of the vouchers, moneys or securities, or had any notice of the opening of any account in their name, and that all the moneys credited in these accounts were held by the defendants as the property of the plaintiff and subject to his order. The Referee found due to the plaintiff the sum of \$14,808.43, for which he directed judgment. The defendants excepted to the several findings of fact and conclusions of law of the Referee.

J. Larocque, for defendants, appellants.

I. By the correspondence and accounts in evidence by which the engagements of the parties were contracted and their rights were fixed, Page, Bacon & Co. became debtors to E. R. & W. L. Geary, and liable to account to them for all the funds and securities in question, and the relation of debtor and creditor does not exist between them and the plaintiff. (*Del. & Hud. Canal Co. v. Westchester Co. Bank*, 4 Denio, 97; *Weston v. Barker*, 12 Johns., 276; *Barker v. Bucklin*, 2 Denio, 45; *Schermerhorn v. Vanderheyden*, 1 Johns., 139; *Elwood v. Monk*, 5 Wend., 235.)

II. The letters of the plaintiff are conclusive upon him that he procured these engagements to be contracted by Page, Bacon & Co., to E. R. & W. L. Geary, upon full consideration, to wit: An equivalent amount of money due by him to E. R. & W. L. Geary, as their guardian, and which he was liable to account for and pay to them; and having procured their engagements to those parties, to be

Geary v. Page *et al.*

contracted on the faith of those letters and assurances, he is now stopped from denying or retracting them. (*Gilleland v. Failing*, 5 Denio, 308; *Townsend v. Ohn*, 5 Wend., 207; *Diedrick v. Bickley*, 2 Hill, 271; *Vroom v. Van Horne*, 10 Paige, 549; *Eastman v. Tuttle*, 1 Cow., 248; *Miller v. Watson*, 4 Wend., 267; *Dezell v. Odell*, 3 Hill, 215.)

III. The engagements thus entered into between the plaintiff and Page, Bacon and Company, would be equally conclusive upon the latter, in a suit by E. R. and W. L. Geary against them, and would estop them to deny that the funds and securities are the property of E. R. and W. L. Geary. (Same cases.)

IV. Even if the plaintiff, John W. Geary, were at liberty to deny, and had denied, (neither of which is the case,) the fact that he had thus had full consideration for the engagements thus contracted by the defendants to E. R. and W. L. Geary, at his request, and in consideration of the funds thus deposited with the defendants by him, it would be a gift, executed by the delivery to and deposit with the defendants for the benefit of the donees, and equally irrevocable by the plaintiff. (*Grangiac v. Arden*, 10 Johns., 293; *Gardner v. Gardner*, 22 Wend., 526; 7 Paige, 112; *Grover v. Grover*, 24 Pick., 261; *Smith v. Smith*, 7 O. & P., 401; *Irons v. Smallpiece*, 2 B. & Ald., 551.)

V. The parol evidence of the plaintiff as to his communication to Henry Haight, on the 31st of January, 1853, of his intention of depositing and accumulating a fund with them, in the names of his wife and of his sons E. R. and W. L. Geary, and as to his future designs in the disposition of that fund, is inadmissible, for the purpose of adding to, varying or qualifying the engagements afterwards contracted in writing, between the parties. (2 Phill. Ev., Edwards' ed., 635, 665, 673, and 767; *Egleston v. Knickerbacker*, 6 Barb. S. O. R., 458; *La Farge v. Rickert*, 5 Wend., 187; *Creery v. Holly*, 14 Id., 26; *Ulster Co. Bank v. McFarlan*, 3 Denio, 553; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch., 273; *Durgin v. Ireland*, 4 Kern., 322; *Norton v. Woodruff*, 2 Comst., 153.)

VI. Even if it were admissible it would be inapplicable, and could have no effect, as the whole subsequent written correspondence shows that the transactions which afterwards did take place, were not those contemplated in such prior conversation.

VII. He nowhere denies in his evidence that he did, in point of fact, owe, as guardian to E. R. and W. L. Geary, the full amount for which he directed his funds and securities to be placed to their credit. All that he does deny is that the identical funds and securities which he deposited were their property, and that he ever intrusted and delivered to them the proceeds and securities received, and that he owed his two sons so large an amount for moneys received from the estate of their maternal grandfather. He may well have owed them the full amount received from other sources.

VIII. His oral testimony cannot avail him to contradict his deliberate written statements.

IX. It is impossible for the plaintiff to recover in this suit, brought in his own name, and for his own benefit, not recognizing the existence of E. R. and W. L. Geary, money due to them. For that purpose suit must be brought in their names by their guardian. (*Genet v. Tallmadge*, 1 Johns. Ch. R., 3; *Evertson v. Evertson*, 5 Paige, 644; *Morrell v. Dickey*, 1 Johns. Ch. R., 153; *M'Loskey v. Reid*, 4 Bradford, 334; Code, §§ 115, 116.)

X. No judgment which could be rendered in this suit would protect the defendants against a suit subsequently brought by E. R. and W. L. Geary, who are not parties to the present one, and consequently could not be concluded or in any manner affected by the judgment. (*Maybee v. Avery*, 18 Johns., 352; *Dale v. Roosevelt*, 1 Paige, 35.)

XI. The transaction detailed in the letters of September 18, 1855, September 19, 1855, November 16, 1855, and December 19, 1855, amounted to a good and valid accord and satisfaction of the claim, whether considered as that of the plaintiff or of E. R. and W. L. Geary. (*Weed v. Ellis*, 3 Caine's R., 253; *Anderson v. Highland Turnpike Co.*,

Geary v. Page et al.

16 Johns., 86; *Frisbie v. Larned*, 21 Wend., 450; *Evans v. Wells*, 22 Id., 324; *Douglass v. White*, 3 Barb. Ch. R., 621; *Webb v. Goldsmith*, 2 Duer, 413; *Kellogg v. Richards*, 14 Wend., 116; *Hoyt v. Thompson's Ex'rs*, 19 N. Y. R., 207.)

XII. After the opening of the accounts of E. R. and W. L. Geary, and the closing of his own with the defendants, the plaintiff, in all his correspondence with them, professed to act in behalf of E. R. and W. L. Geary, and as their guardian. The defendants had a right to rely on his statements in that respect, and to make him the remittances which they did; but this gives him no right of action against them in his own name.

E. W. Stoughton, for plaintiff, (appellant,) argued that the moneys and securities were the property of the plaintiff and at all times remained so, and that there had been no accord and satisfaction.

BY THE COURT—MONELL, J. The finding of the Referee that neither E. R. Geary, nor W. L. Geary was ever in possession of any of the vouchers, securities or moneys deposited by their father, with the defendants, appears to be fully sustained by the evidence. All the dealings with respect to these funds were with the plaintiff. No correspondence or other evidence showed any notice whatever to the plaintiff's children of the deposit in their favor, nor does it appear that their right to the fund, was admitted or recognized by the defendants at any time during the series of years of their dealings with the plaintiff. The instructions of the plaintiff to transfer the accounts to the names of his children were followed by the defendants and were recognized by them as the directions of one having authority to give them. The defendants never took any steps to apprise the plaintiff's children of the transfer of these funds to their account, but constantly recognized and admitted, by their acts and correspondence, the absolute dominion and authority of the plaintiff over them. It is not necessary to inquire into the motive of the plaintiff in directing the transfer of the securities, &c., to his

Geary v. Page *et al.*

children. The most that can be claimed by the defendants, is, that it was intended as a *gift* from the plaintiff to his children. There does not appear to have been any indebtedness of the plaintiff to his sons, or any obligation, express or implied, legal, equitable or otherwise, from which it might be inferred that he designed to pay or extinguish such debt or obligation, and which might have raised an implied assumpsit in their favor. His children, at the time of the transfer, were of very tender years, and there is no evidence, other than that the transfer was the voluntary act of the plaintiff, without pecuniary consideration, and without losing or intending to lose absolute control over the funds. But the Referee has further found, that all the moneys at any time due or payable on any of the accounts, were held by the defendants, as the property of the plaintiff, and subject to his order. The evidence shows, that notwithstanding the plaintiff's directions to the defendants, to open accounts in the names of his two sons, he still continued the owner of the funds and securities. The plaintiff distinctly testifies, that at no time did they cease to belong absolutely to him; and this must be held to be so, unless the law upon the facts adjudges it otherwise. If oral testimony of the intention of the party is to govern, the plaintiff was the owner of the funds. It cannot, I think, be pretended that the mere instruction of the plaintiff to open these accounts in the names of his two children, was a transfer to them, *ipso facto*, of the funds and securities themselves. There was no debt to pay and therefore no consideration for the transfer. The defendants' counsel has referred us to a number of cases, to establish his proposition, that by the transfer, the relation of debtor and creditor arose between the defendants and E. R. & W. L. Geary, and that they became liable to account to them for all the funds and securities in question. Those were all cases of promises made to another for the benefit of a third person, and it was held that an action for money had and received would lie. But in all those cases, it is to be observed there was

a good consideration moving between the person to whom the promise was made and the third person for whom it was made. There was no debt due from the plaintiff to his children, which would be a consideration for the transfer, and which might imply a promise by the defendants to pay. (*Judson v. Gray*, 17 How. Pr., 289, 295, and cases there cited.) Besides, no case can, I think, be found where this principle has been applied to other than an express promise. The defendants never promised to pay these moneys or securities to the plaintiff's children, and I cannot see how, upon the principle of an implied assumpsit, they could recover them. The case of *Duncan v. Bates*, in MSS., decided in the Supreme Court of this State in the first district, was an assignment by L. O. Wilson & Co. to Bates & Wilson for the benefit of the creditors of the assignors. At the time of the assignment, the assignors had \$70,000 on deposit with the plaintiffs. Notice of the assignment was given to the plaintiffs, and they were authorized to transfer to the assignees the deposit, and it was so transferred on the plaintiffs' books. Subsequently, creditors of L. O. Wilson & Co. attached the funds in the plaintiffs' hands, claiming them as against the assignees. The plaintiffs sought to interplead the assignees and attaching creditors, in order that it might be determined to whom the fund belonged. The learned Justice who delivered the opinion in this case says the transfer of the fund to the assignees upon the order of the assignors was equivalent to an actual payment of the order to them, and a new deposit by them of the moneys, on their own account. On this ground it was held the plaintiff had failed to show a case for interpleading the defendants. Although the ground upon which the learned Justice put his decision does not, in my judgment, aid the defendants' view of this case, yet I should have been better satisfied if it had been placed upon another, and it seems to me firmer ground. Here was a general assignment for the benefit of creditors, which passed to the assignees all the property, rights and choses in action of the assignors, and gave to the assignees

Geary v. Page et al.

the right to immediate and absolute possession. Upon notice to Duncan & Co. of the assignment, the assignees became vested, not only with a property in the funds, but with the right to their actual possession. This they held as trustee for the creditors, and could not be divested of by any one of them. The order was unnecessary, or at most auxiliary to the assignment; the latter conferring all the title needed, and was in itself a perfect defense to the claim of the creditor. The case I am now considering is essentially different from that of *Duncan v. Bates*. Here there was no assignment of the funds—no rights of creditors to intervene—no taking possession by the plaintiff's children—nothing upon which they could raise any legal claim whatever; and, therefore, while fully approving of the conclusions in that case, I cannot apply them to the facts in this case.

The next inquiry is, was this a gift to the plaintiff's children, either *in presenti* or *in futuro*. That the plaintiff intended ultimately to make his children the objects of his bounty, is perhaps inferable from the transactions in the case. It is difficult to discern any other motive for the change in the accounts from himself to his children; but that he designed, at the time of the transfer, to donate to his sons the funds and securities, no where appears. In order to constitute it a valid gift, delivery was essential. A mere promise or declaration of an intention to give, however clear and positive, would not be enough. The intention must be consummated and carried into effect by those acts which the law requires to divest the donor of, and invest the donees with, the right of property. The donor must part not only with the possession of, but with the dominion over, the property. (*Gilchrist v. Stevenson*, 9 Barb., 9, 13; *Huntington v. Gilmore*, 14 Id., 243, 246; *Harris v. Clark*, 3 Comst., 113; *Van Deusen v. Rowley*, 4 Seld., 358.) And if he retains authority or dominion over the subject of the gift, or there remains in him a *locus penitentiae*, there is not a perfect and legal donation. (*Hitch v. Davis*, 3 Md. Chy. Decis., 266.) That the plaintiff did

Geary v. Page et al.

retain dominion over the securities and moneys in the defendants' hands, is abundantly supported by the proof in the case. The fund was always held subject to his direction and control; payments of interest, income and principal were frequently and constantly made to the plaintiff, and no doubt suggested, or question raised as to his absolute right to receive. The transaction, therefore, lacks the principal essential in a gift, namely, delivery, and a loss of dominion over the subject of the gift. Had the question arisen between creditors of E. R. & W. L. Geary and the defendants, the former would, I think, have failed to show any right to these funds; how much less can the defendants in this action set up property in E. R. & W. L. Geary as a defense to the plaintiff's claim. After so fully and freely admitting the plaintiff's right to, and control over these funds during the several years through which the transactions run, it seems to me it is now too late for the defendants to claim exemption on grounds so hostile to their previous acts. It is not disputed that the defendants were the depositaries of the plaintiff's funds; nor is it questioned that they owed a duty to some one to discharge the obligations imposed by such deposits. Can it be doubted to whom, at the commencement of this suit, they owed that duty? I think not. The plaintiff never having parted with his property in the funds in the defendants' hands, could maintain his action for their recovery.

The only remaining question I deem it necessary to examine, is the defense of accord and satisfaction set up by the defendants. On the 18th of September, 1855, the defendants, by F. M. Haight, wrote the plaintiff that they had compromised certain claims set apart on the failure of the defendants' house, as a security for the debt due the plaintiff, at \$12,000, cash \$6,000, and a note for \$6,000, at three months, and then say, "the amount must be received in full of your debt against Page, Bacon & Co. You will please send me a proper discharge from C. R. and W. L. Geary of the debt due them from Page, Bacon & Co." To this letter the plaintiff, under date of Nov. 16, 1855, wrote

Geary v. Page *et al.*

the defendants, through Henry Haight, and after acknowledging the receipt of the letter of the 18th of September, says, "I desire this to serve you as a receipt *until you forward me the balance and such releases as you desire me to execute* in behalf of my wards, E. R. and W. L. Geary." No other evidence is relied on by the defendants as establishing or tending to establish an accord and satisfaction. It is enough to say that the plaintiff, it seems to me, rejected the proposition to receive the compromise sum in full of his debt against Page, Bacon & Co. He received the remittances on account only, and sent his receipt, to be held until the balance was forwarded, with such releases as the defendants desired him to execute. He in effect declined to accept the cash and note in full, and nowhere waived his right to claim the balance of his debt. The law is well settled that an accord, without acceptance of that which is offered or agreed to be taken, is not satisfaction. (*Allen v. Roosevelt*, 14 Wend., 100; *Hawley v. Foote*, 19 Id., 516; *Brooklyn Bk. v. DeGrauw*, 23 Id., 342; *Tilton v. Alcott*, 16 Barb., 598; *Day v. Roth*, 18 N. Y. R., 448.) Even if there had been an agreement to accept, it was wholly executory, and upon the authority of the above cases, could have been rejected, on a tender of performance by the defendants. It constitutes, in my judgment, no defense to the action.

The Referee having found an amount due the plaintiff, upon an examination of the accounts between the parties, and it not being claimed that such finding is against the weight of evidence, I can see no reason why we should disturb his report, charging the defendants with the amount in this action, and directing judgment therefor.

I am of opinion that the judgment appealed from should be affirmed with costs.

ROBERTSON, J. Besides the accord, the only question is, if, on the evidence in this case, the plaintiff's children could recover against the defendants. It is not a case of novation whereby, in consideration of the defendants promising

O'Rourke v. Hart.

to pay such children the amount due, the plaintiff agreed to discharge the defendants, because the children were not present to accept, or parties to the promise. Even if a promise by C. to A. to pay B. a sum of money in consideration of A.'s agreeing to discharge C. from a prior liability to him be valid, either A. or B. can maintain an action on such promise, if by parol; the former, because expressly made to him, and the latter, by reason of his beneficial interest; and that is the most that can be made of this case. The plaintiff can sue and recover, whatever may be his childrens' rights against him. I concur in the other views.

ELLEN O'BOURKE, Plaintiff and Appellant, v. HENRY HART, Defendant and Respondent.

The Street Commissioner of the City of New York, and not the Commissioner of Repairs and Supplies, is the proper officer to authorize the widening of the carriage way in a street in the city.

The former decision of this Court in this case, (7 Bosw., 511,) that upon the facts disclosed, the defendant was not liable, re-affirmed and followed.

(Before BARBOUR and MONWELL, J. J.)

Heard, April 7, 1862; decided, April 26, 1862.

THIS was an appeal from an order denying a new trial, and from the judgment entered thereupon, in favor of the defendant, for costs.

The action was brought to recover for an injury sustained by the plaintiff, by the alleged careless, negligent and unskillful act of the defendant and his servants in taking down an iron railing over the sidewalk, at the corner of Chatham and Pearl streets, in the City of New York.

The trial on which this judgment was ordered, was the second trial of the cause. On the former trial, the Jury rendered a verdict for the plaintiff, and upon exceptions taken by the defendant to the charge of the Judge, the Court at General Term, granted a new trial, (see 7 Bosw., 511,) which was had before the Mr. Justice WHITE and a Jury, on the 21st of October, 1861.

O'Rourke v. Hart.

It appeared upon this trial, substantially as before, that the defendant was a director of the Third Avenue Railroad Company, whose track lay through Chatham street; and that he, being directed by the company to procure the street to be widened at that point by setting back the curb-stone, he, after obtaining permission of the Street Commissioner, employed one Carnley, who did iron work for the company, to make the necessary alterations in the awning posts and rails; and Carnley's workmen caused the accident.

William M. Allen, for plaintiff, appellant.

The Street Commissioner had no power to give the permission, therefore all persons who directed, advised, assisted or countenanced the transaction were joint wrongdoers. (11 Johns. R., 285; 1 Chitty Pl., Springfield ed., 1837, p. 91.)

The charter of 1849 was then in force, and by it the Superintendent of Repairs and Supplies was the person who had control of this business. (See Session Laws of 1849, page 281, § 13.)

Clarkson N. Potter, for defendant, respondent.

I. Defendant is not liable. The workmen who did the injury were not his employees, but Carnley's. (*Blake v. Ferris*, 1 Seld., 57; *Pack v. Mayor of N. Y.*, 4 Seld., 227; *Kelly v. Mayor of N. Y.*, 1 Kern., 436; *Storrs v. City of Utica*, 17 N. Y. R., 108.)

II. But if there was any superior to Carnley, it was the railroad company.

III. Had the change in the street been unlawful, (which it was not,) it would have made no difference. The injury was not an injury by Hart, his servants, or employees. (Same authorities.)

IV. The proof shows no such negligence as will warrant a recovery.

BY THE COURT—MONELL, J. The facts disclosed upon the second trial were identical with those proved on the first trial. I cannot perceive, after a careful examination

O'Rourke v. Hart

of the evidence given on the first trial, that the plaintiff has made out any stronger or different case than was presented to the General Term, when this case was up before.

The learned Justice who delivered the opinion of the Court on that occasion, decided, and, as I think, correctly, that there was no evidence in the case which would render the defendant liable for any act, negligent or otherwise, of the workmen employed to remove the railing from the sidewalk. They were the servants of Carnley, who had undertaken to do the work for the Third Avenue Railroad Company, and who alone could exercise control over them, and were not in any sense the employees of the defendant. It was not necessary then, nor is it now, to decide whether the action might have been maintained against the Third Avenue Railroad Company or against Carnley. It is sufficient that the defendant in this action is not liable. On both trials, the only evidence to charge the defendant, was, that he gave the order to Carnley to do the work; that he did so by the direction of the railroad company, for whom the work was done, and had no other or further connection with it. It is manifest, therefore, that the defendant cannot be held responsible for any negligence of the servants of Carnley, over whom the defendant could not exercise any control, and who were not in any way subject to his direction.

In the view, therefore, taken by the General Term of this Court, the order and judgment appealed from must be affirmed, unless a new point, now, apparently, for the first time taken, should lead to a different conclusion.

It is now claimed, that the removal of the rail was without authority, and, therefore, all persons who directed, advised, assisted or countenanced its removal are to be regarded as co-trespassers, and liable for the injury sustained by the plaintiff, who was in the lawful use of the street where the trespass was committed. The evidence of the authority was, that permission to remove the rail was obtained by the Third Avenue Railroad Company,

O'Bourke v. Hart.

from the Street Commissioner, and it is now insisted that such authority should have come from the Commissioner of Repairs and Supplies, and not from the Street Commissioner.

The case on the former trial contains the same evidence, but it does not distinctly appear that the objection now taken was then urged; although the learned Justice treated the permission received from the Street Commissioner as sufficient authority to render the removal of the rail lawful, for he says, "this rail, we must assume, might lawfully be removed." And hence I would probably be justified in concluding that this point was considered and passed upon by the Court.

But, assuming that it was not, can it be of any avail to the plaintiff?

We are referred to sections 12 and 13 of the Amended Charter of 1849, (Sess. Laws 1849, 278, 281,) which provide, (§ 12): "There shall be an executive department, under the denomination of the 'Street Department,' which shall have cognizance of opening, *regulating and paving* streets. The chief officer shall be called the Street Commissioner." And, (§ 13,) "There shall be an executive department, to be denominated the 'Department of Repairs and Supplies,' which shall have cognizance of all repairs and supplies of and for roads and avenues, public pavements; * * the chief officer thereof shall be called the Commissioner of Repairs and Supplies."

The evidence was, that the Third Avenue Railroad Company applied to the Street Commissioner for permission to widen Chatham street at its junction with Pearl street, to afford additional and increased accommodation to their cars in passing that point. The permission was given by the Street Commissioner. In preparing to widen the street, it became necessary to remove the rail in question, the removal of which occasioned the injury to the plaintiff. Even if Chatham street is to be regarded as a "road" or "avenue," within the meaning of the 13th section of the Amended Charter, of which I think there is great

Bartlett et al. v. Robinson.

doubt, it appears to me to be quite clear, that the permission applied for was not to "repair," but rather to "regulate and pave" the street. The duty of the Commissioner of Repairs and Supplies is confined to repairing roads and avenues, and of the Street Commissioner, to opening, regulating and paving streets, and, in my opinion, the latter officer was the proper functionary to authorize an alteration of the character applied for by the railroad company. If the roads or avenues, (by which is meant, I think, the country roads and the avenues, as distinguished from the streets proper,) are out of repair, caused by their use, or by caving, or by flood, or by accident, it is doubtless the duty of the Commissioner of Repairs and Supplies to cause them to be repaired; but where an alteration of the street is to be effected, or it is to be opened, or regulated, or paved, the Street Commissioner is the proper officer to authorize the work.

The permission, therefore, obtained by the railroad company from the Street Commissioner, gave them authority to remove the rail; and they or the workmen of Carnley were engaged in a lawful act when the accident occurred; and neither they nor those by whose direction they were engaged, were trespassers.

The order and judgment appealed from must be affirmed, with costs.

**JONAS BARTLETT *et al.*, Plaintiffs and Appellants, v.
CHARLES ROBINSON, Defendant and Respondent.**

Under the act of 1857, (Sess. Laws, Vol. 1, p. 839, § 3,) which provides that a notice of protest for an indorser residing in the same city or town where the note is payable, may be served by mailing it there, "directed to the indorser, at such city or town,"—a notice to an indorser residing in a large city, directed merely by his name and the name of the city, is not sufficient, where he has added to his indorsement the designation of his street and number. An indorser still has a right to make it a part of his contract that the notice shall be sent to a particular place; and where he designates

Bosw.—VOL. IX. 39

Bartlett et al. v. Robinson.

a specific address within the city, a notice sent by mail must be addressed accordingly.

(Before BARBOUR and MONELL, J. J.)

Heard April 16, 1862; decided April 26, 1862.

APPEAL from a judgment entered upon the report of H. W. Robinson, Esq., Referee.

The action was by Jonas Bartlett and Addison B. Gates, against the defendant as indorser of a promissory note. The note, which was given in evidence, was indorsed "Charles Robinson, 214 E. 18th St." It was dated at New York and was payable at the office of Collins & Brown, 96 Broadway. The defendant served with his answer, an affidavit that he had not received any notice of the non-payment and protest of the note. It was proved on the trial, that the notary mailed a notice of the presentment and non-payment of the note to the defendant; that the same was deposited in the post-office in New York, directed "Charles Robinson, New York," and the postage prepaid thereon.

The Referee found these facts, and also that the defendant resided in the City of New York. He found as conclusions of law, that the plaintiffs were guilty of negligence in neglecting to cause notice of protest of said note to be directed to the defendant at his residence, No. 214 East Eighteenth street, in the City of New York; and that the notice directed to him at New York, was insufficient to charge the defendant as indorser. The Referee directed judgment for the defendant.

The plaintiffs duly excepted to the conclusions of law.

G. Stevenson, for plaintiffs, (appellants,) insisted that the notice was strictly according to the act of 1857, and that upon no construction of that act could anything more have been required.

W. W. Niles, for defendant, (respondent.)

I. An indorser has a right to designate where notice of protest shall be sent, and the failure to send notice as directed, discharges the indorser.

Bartlett *et al.* v. Robinson.

The designation of his residence by the street and number, is a direction to have such notice sent to his residence. *Morris v. Husson*, 4 Sandf. R., 93.)

II. Where he resides in a large city, a notice directed to him, generally, at such city, is not good, where the holder has the means of giving more exact directions as to the street and number of the indorser. (Story on Promissory Notes, §§ 345, 346; Chitty on Bills, 4th Am. ed., 474.)

III. This was the rule at common law. The object of the statute is simply to allow the notice to be mailed through the post-office, instead of being served personally, or being left at the party's residence, or place of business, as was previously required, and thus assimilate the mode of service to that which prevailed in most other cases. The real question then is, was this so addressed within the meaning of the statute, and under the very strict rule requiring all diligence to get the notice to the party?

IV. In the construction of statutes the object of the change in the law is to be regarded, and no greater change is to be assumed to have been contemplated than was necessary to carry the particular intent into effect. Although this statute provides that the notice may be directed to the drawer and indorser, at such city or town, it does not attempt to prescribe what shall be a sufficient or proper direction to the drawer or indorser, nor to override, or interfere with, any of the requirements of the common law in that respect.

BY THE COURT—MONELL, J. The only question in this case is whether the notice of protest was properly served, so as to charge the indorser.

Formerly, service of notice of protest through the post-office was not allowed in any case, wherever the indorser might reside. (*Ransom v. Mack*, 2 Hill, 587.) The rule was subsequently relaxed. When the person to be served resided in a different place from the one where the note was presented, and there was a regular mail communication between the two places, service by post was allowed.

Bartlett *et al.* v. Robinson.

But the notice was required to be directed to the residence of the indorser. Yet it was sufficient if it was directed to a post-office where he was in the habit of receiving his letters. (*Montgomery Co. Bank v. Marsh*, 3 Seld., 481.) The Act of 1835, (Sess. Laws, 1835, p. 152,) declared that it was sufficient service if directed to the city or town where the indorser resided, at the time of indorsing, unless at the time of affixing his signature, he should, in addition thereto, specify thereon the post-office to which he might require the notice to be addressed. Under this act, if the indorser specified the post-office to which he desired notice to be sent, it would not be sufficient to charge him if it was sent elsewhere. In so far the former rule was changed. In the absence of any such specification, the notice must be sent to the residence of the indorser, or to the post-office where he usually received his letters, if known to the holder. Where the indorser, however, resided in the same city or town in which the note was payable, it was required that the notice should be served on him personally, or by leaving it at his residence or place of business. (*Van Vechten v. Pruyn*, 3 Kernan, 549.)

The act of 1857, (Sess. Laws, 1857, vol. I, p. 839, § 3,) provides that where the residence or place of business of the indorser is in the same city or town in which the note may legally be presented for payment, notice of non-payment may be served, by depositing the same, with the postage prepaid thereon, in the post-office in the city or town where such note was presented, directed to the indorser at such city or town. The notary in this case has followed the very letter of the statute, whatever may be its spirit and meaning.

I cannot entertain a doubt that an indorser may make it a part of his contract that notice of the dishonor of the note or bill shall be sent to him at a particular place, and that where he does so, and it is known to the holder, a notice sent elsewhere would be insufficient. There are many cases in the books where it has been held to be a sufficient service if sent to the place indicated by the

Bartlett *et al.* v. Robinson.

indorser. (Story on Prom. Notes, § 314; *Brent v. Bank of the Metropolis*, 1 Peters S. C. R., 89; *Morris v. Husson*, 4 Sandf., 93.) And it seems to me to follow that a service thus made is not only sufficient, but that it cannot be made at any other place. If the maker of a note makes it payable at a particular place, it must be presented there for payment, and a presentment elsewhere would not be sufficient. (Story on Prom. Notes, § 227.)

The object of a notice of dishonor of a note or bill to an indorser, is that he may protect himself from loss, and the law requires the greatest diligence on the part of those who would charge him, that he may receive early notice of the protest. The stringency of the common law rule has, as we have observed, been modified by the two statutes above referred to; but neither of them has intrenched upon the right of the indorser to require notice to be given to him, at a place designated by himself. The act of 1857 must be regarded of doubtful policy in its application to large and populous cities, where hundreds of the same name are to be found, and where a notice addressed to an indorser at such a city, without any designation of street or number, would hardly reach him. Hence the greater necessity on his part of guarding against a failure to receive his notices, by a designation, under his name, of his street and number. I think he has a right to do so, and to require thereby that his notice shall be addressed to him at such place.

The defendant having done so in this case, the notary should have addressed the notice of protest accordingly. His failure to do so discharged the defendant, there being no evidence that he received the notice.

The judgment should be affirmed with costs.

Penny v. Black.

**HENRY W. PENNY, Plaintiff and Appellant, v. GARRET
C. BLACK, Defendant and Respondent.**

1. In a copartnership, the partners may stipulate simply as to the profits, where one is to furnish all the materials, while both may bestow labor; and in such case, the only specific interest of all is in the profits, and, as to the property, the partnership is only in the use or employment of it as an instrument of profit.
2. Where C. and B. formed a partnership in the business of making, selling and letting chronometers, C. contributing all the capital, and B. giving his labor only, and receiving his salary and a share of the profits, and C. agreed to put into the stock of such partnership certain chronometers which were his property, upon a stipulation "that they should be taken at a fair valuation, as a stock in trade, so that upon a sale of them at the usual market price, the profit usual in that branch of business might be made on them," but this agreement was never reduced to writing, as was intended, nor was a valuation ever fixed upon; and, after dissolution of the firm, both partners remained in the store they had occupied as partners, and C. let the chronometers in his own name, and kept his own accounts of them, and there was some evidence that it was understood between the parties that C. was to take the stock and pay the debts:
- Held* that, after such dissolution, the chronometers were the property of C., and that his lessee of one of them could recover possession of it from B., who had taken it away from him.
3. Upon such an agreement, the chronometers did not become the property of the firm, but continued always the property of C., the firm having a permission to use them.
4. *Held further*, that, if this were not so, yet the evidence in this case was sufficient to show that, upon the dissolution of the firm, B. had relinquished any interest in them and retransferred them to them to C.

(Before MONCRIEF, ROBERTSON, WHITE, BARBOUR and MONKELL, J. J.)

Heard, March 15, 1862; decided, May 10, 1862.

THIS was an action to recover possession of a chronometer, to which the plaintiff claimed to be entitled as bailee for hire of one Frederick Creighton.

The instrument in question, which was numbered 1,354, had been the property of Mr. Creighton, in the year 1853; prior to that time it had belonged to the firm of Bliss & Creighton, of which he was a member, and which had conducted the business of manufacturing, selling and letting out similar instruments for upwards of twenty

years. These instruments were numbered, for the purpose of identification. On the dissolution of that firm, their stock was divided, and the instrument in question, among 150 others, became the sole property of Creighton.

On the trial the plaintiff introduced in evidence, a complaint verified by the defendant's oath in an action brought by him against Creighton. In that complaint a verbal agreement was set up between the defendant and Creighton, made about the 18th of April, 1853, to become partners under the name of Creighton & Black, in the business of making, selling and letting out chronometers; by it the defendant was not to contribute any capital, which was all to be furnished by Creighton, both parties equally devoting their time and labor to the business. The defendant was to draw a salary of \$1,000 a year to be guaranteed to him, whether there were profits or not, nothing being said about losses, and of the remaining net profits he was to receive one-fifth and Creighton the other four-fifths. The business was conducted under such firm until the 18th April, 1856, when it was terminated by a notice from Creighton. The defendant had further alleged in such complaint that Creighton "*put into the stock of such new partnership*" the stock which he derived from the old firm of Bliss & Creighton, but without affixing any price to the chronometers, "*but it was agreed that they should be taken at their fair value as a stock in trade, so that upon a sale of them at the usual market price thereof, the profit usual in that branch of business might be made on them,*" and that it was further agreed that an instrument in writing should be drawn up as soon as convenient, which was never done.

The defendant being examined in the present action, as a witness for himself, testified, on his cross-examination, that he "never agreed to the price of any of the chronometers; they were to be taken at a valuation; no prices were affixed to the goods at the time of the commencement of the business of Creighton & Black; there never was any agreement * * * as to the prices or values, to be put

Penny v. Black.

"upon those articles including the chronometer in question." A list of sold chronometers was made out by Creighton, assisted by a bookkeeper, (Sayer,) shortly before the dissolution, headed, "A list of chronometers on hand, "January 1st, 1855," and prices were affixed thereto; no list had ever been made before.

The defendant objected to the prices affixed, upon the ground that it was more than they sold for, claiming that it was double their real value. A day or two after the dissolution of the firm it was agreed between the parties that persons should be appointed to value the stock, at the prices at which it ought to come in, and what it was worth after the dissolution.

After the 18th of April, 1856, the dissolution of the firm, the defendant remained in the store previously occupied by it, for some time, until after June, during which time Creighton let out chronometers previously belonging to him, including the one in question, and such agreements were entered in a private book of his. A son of Creighton's testified that the defendant, in a conversation with his father, after the dissolution, said "he had been there "fifteen or twenty years, and there ought to be something "coming to him," upon which Creighton said, he "had "not put any stock in and could not take any out," to which the defendant seems not to have made any reply. Another witness (Hawley) testified that before the dissolution, he asked the defendant "what was going to be "done about the stock and debts of Creighton & Black," and that the latter said, "Creighton was to pay the debts "and continue on in the old place," and that "Creighton "was to *keep the stock* and pay the debts."

The chronometer in question was fully completed before the formation of the partnership of Creighton & Black, and was let by Creighton in his own name, in June, 1856, to the plaintiff, who undertook, by a written agreement, to return it, "*at the end of the voyage*," on which he was then proceeding, "*or within twelve months*." After the voyage expired, the defendant possessed himself of the

Penny v. Black.

instrument in question, from a cook on board of the plaintiff's vessel, without plaintiff's assent, and this action was brought in October, 1856, to recover possession of it.

Evidence was admitted on the trial to prove a usage, by which the written agreement of the plaintiff was made to bind the plaintiff to restore the article hired, at the end of the voyage, or of a year, whichever should sooner happen; and the Referee found the existence of such a usage. He also found that the chronometer was the partnership property of Creighton & Black, at the time of its bailment to the plaintiff, and that the defendant was entitled to its possession.

Exceptions were duly filed to the findings of the Referee.

On a former appeal in this case, from a report and judgment in favor of the plaintiff, the question decided was the competency of the defendant as a witness. (6 Bosw., 50.)

C. A. Hand, for plaintiff, (appellant.)

I. The admission of evidence of custom, to vary the legal construction of the written agreement, was error.

II. By the clear rules of law, the plaintiff had the election at which period, (the expiration of the voyage or of twelve months,) to terminate the hiring. (Comyn Dig. "Cond." K. 1; Bac. Abr. "Cond." P; Id., "*Election*" B.; Chit. on Cont., 729; *McNitt v. Clark*, 7 Johns., 465.)

III. The act of the defendant left the plaintiff defenseless against Creighton, whose original title as bailor he was forbidden to dispute. (*Marvin v. Elwood*, 11 Paige, 365; and see *Bates v. Stanton*, 1 Duer, 84.)

IV. Upon the whole testimony of defendant he had no title to the property. The copartnership was in the use only. The only partnership that can be implied, where the capital belonged entirely to one of the partners, is a partnership in the use of the capital. (*Vide Chase v. Barrett*, 4 Paige, 148.) This ceased with the dissolution and withdrawal of defendant, which was previous to the letting, and thenceforth his interest was solely in the previous profits; and his leaving the property with Creighton, and

other acts, implied, also, a relinquishment of any legal title.

Benjamin G. Hitchings, for defendant, (respondent.)

I. All the facts necessary to make out the right of the defendant to the possession of the chronometer are distinctly found by the Referee; and, moreover, there is not even a conflict of evidence upon any material fact in the case.

II. Upon the facts found, the conclusions of law found by the Referee, among which is that the defendant was entitled to the possession of the chronometer, are unquestionable. Nothing is clearer than that either copartner is entitled to the possession of the partnership property. It is equally clear that a third party cannot recover it from the possession of one partner, in order to give it to another.

III. The plaintiff derives no ground upon which to maintain this action, from the fact that the chronometer had been let out on hire to him by Creighton, or from the terms of the agreement by which it had been so let to him.

1. After the dissolution, Creighton could not let out partnership property to hire, so as to give a valid title against his copartner.

He merely held the partnership property as trustee for settling up the partnership business. He could sell it, but not trade with it, or lease it. (Story on Part., § 322, *et seq.*; 3 Kent's Com., 4th ed., 63, 64; Gow on Part., 253; Coll. on Part., §§ 545, 546.)

2. Even if plaintiff had an election under his contract to keep the property for a further period after the expiration of the voyage, he made no such claim, and did not put his demand upon any such ground, but simply upon the ground that he wanted to deliver the chronometer to Creighton.

3. The agreement or receipt referred to is not to be construed as plaintiff's counsel contends; but it means that the chronometer is to be returned at the end of the

Penny v. Black.

voyage, or, if the voyage is not ended within twelve months, at the expiration of that period of time.

IV. The evidence of the custom of the chronometer trade, in explanation of the receipt or agreement, was admissible; for if the words of the instrument are not ambiguous, they mean what the parol evidence proved, and, therefore, the explanation of it is immaterial. If ambiguous, the evidence was admissible to explain and give a construction to it. (*Coit v. The Commercial Ins. Co.*, 7 J. R., 385; *Goodyear v. Ogden*, 4 Hill, 104; *Dawson v. Kittle*, 4 Id., 107.)

BY THE COURT—ROBERTSON, J. It is plain, that the question first passed upon by the Referee, of the property in the article in question, lies at the foundation of the plaintiff's right of possession.

Unless Creighton, on the formation of the firm of Creighton & Black, actually transferred and delivered the article in question, so as to become the joint property of the partners, he would still remain the owner. No mere agreement to contribute any articles, to become the subject of partnership dealings, would be sufficient, without an actual transfer and delivery; nor would even the subsequent employment of them in such partnership business, by itself, establish the sale and delivery of them to all the partners, as partnership stock. It is possible for partners to stipulate simply as to the profits of a business, where one is to furnish all the materials with which it is to be carried on, while both may bestow their labor; the only specific interest of all, in such case, is in the profits, Coll. on Part., §§ 17, 18,) and the partnership is only in the use or employment of the articles as instruments of profit, (*Champion v. Bostwick*, 18 Wend., 183; *Chase v. Barrett*, 4 Paige, 148; *Everett v. Coe*, 5 Denio, 180; Coll. on Part., § 18, n. 1.) The statements of the defendant show that, as to some parts of the agreement of the partners, it was merely inchoate, and the stipulations conditional; thus it was agreed that Creighton should put in his former stock,

Penny v. Black.

at such a fair valuation as would enable the parties to make an ordinary profit; but such price never was settled, and, on occasion of the only attempt to do so, the parties disagreed, and upon the ground, as stated by the defendant, that no profit could be made out of them, thus recognizing in a measure the right of Creighton to retain the ownership of the articles, provided he did not charge the firm more than was sufficient to leave room for profit; but not only does no price seem ever to have been determined, or written instrument executed, but no credit was given in the books, or entry made, respecting the ownership of the articles; they remained, except so far as they were used in the business of Creighton & Black, the same as before as to ownership, unless the mere agreement to transfer operated as a legal transfer, which it did not.

- The joint possession of them by both parties was equally consistent with a transfer of property and permission to use, and by itself was no evidence of an executed transfer. The determination of the value, which was an essential condition to a transfer, never took place; and unless we are at liberty to infer a sale, upon a *quantum meruit*, and an agreement to pay upon demand, there was no undertaking by the defendant to pay anything. Besides this, it would be difficult to determine what interest the defendant would take, under the supposed agreement, in the stock when transferred,—what rights he would have in them, if the partnership had been dissolved immediately after it was formed. If it was governed by his interest in the profits, that was \$1,000 a year and a fifth of the surplus; the proportions, therefore, could not be determined from that; and the parties must be supposed to acquire an equal interest in the capital stock. If so, the result would have been that the defendant acquired by such an agreement an ownership of one undivided half of the stock of Creighton, without paying anything, upon an undertaking to pay one-half the value, without any provision for deducting that price from his share of the profits,—a result not to be inferred without positive evi-

Penny v. Black.

deuce, or as an unavoidable conclusion from circumstances. It would seem that the effort to arrange the price to be paid Creighton for the stock contributed by him, was not made until the close of the partnership, until which time the arrangement remained in the same indeterminate condition. The probability that no definite arrangement ever was made as to the transfer of the stock, is strongly increased, if not made certainty, by the testimony of young Creighton, to the effect that the defendant was not to withdraw any stock, because he had put none in; that of Hawley, to whom the defendant admitted that Creighton was to take the stock and pay the debts; and the fact that the latter dealt with the stock as his own, after the dissolution. The finding of the Referee, that the chronometer in question was the property of the firm of Creighton & Black, is unsupported by evidence, and against evidence.

But even were such conclusion untenable, the same evidence would go to make out a case of transfer or release of the stock, after the dissolution, to Creighton. The defendant had not paid for his interest in it, if any, and it was not unreasonable to believe he had relinquished such interest, upon an agreement to protect him against the debts; and his subsequent acquiescence in the resumption by Creighton of his entire ownership of the articles forming such stock, without any formal release, completed the retransfer in the same informal way in which the original transfer had been made.

The report of the Referee was, therefore, erroneous on one of those two grounds, and should be set aside. It, therefore, becomes unnecessary to pass upon the question of the different interpretation of the agreement made by the plaintiff, by means of the usage found by the Referee.

The judgment must be reversed, the report of the Referee set aside, the order of reference discharged, and a new trial had, with costs to abide the event.

OWEN O'CONNOR, Plaintiff and Respondent, v. GEORGE SUCH *et al.*, Defendants and Appellants.

Where an action upon an official bond, *e. g.*, the bond of an administrator, is brought in the name of an individual plaintiff, and not in the name of the people, the judgment should not be for the amount of the penalty, but only for the amount of the damages and costs.

(Before BOSWORTH, Ch. J., and BARBOUR and MONELL, J. J.)

Heard, April 11, 1862; decided, May 10, 1862.

THIS action was brought upon an administrator's bond against Such, the administrator, and William F. Cary and Charles A. Heckscher, his sureties.

The Surrogate of the City and County of New York having made an order requiring Such, as administrator, to pay Owen O'Connor \$2,240, on account of a claim of the latter against the intestate, and to pay the proctor of the latter seventy-five dollars costs, and the fees of the Surrogate accrued upon the accounting; and Such having failed to comply, the decree was docketed with the County Clerk and execution issued thereon, according to the statute, for the sum of \$2,331.83, with interest. The execution being returned unsatisfied, O'Connor applied to the Surrogate for an order assigning the administration bond to him to prosecute, which being granted he brought the present action thereon. The complaint alleged these facts and demanded judgment for \$20,000, the penalty of the bond, and that plaintiff's damages be assessed and he have execution therefor, with costs.

The action was tried at a Special Term, held on the 17th of January, 1862, by Mr. Justice ROBERTSON without a Jury, a Jury trial having been waived by the consent of the parties.

The Court found the facts to be substantially as above stated; and it was adjudged "that the plaintiff recover of the defendants twenty thousand dollars of debt, and eighty-two $\frac{4}{5}$ dollars costs, disbursements and allowance; and, further, that the plaintiff have judgment and execu-

tion against the said defendants for his said damages, together with the costs of this action; which, together, amount to the sum of two thousand four hundred and sixty-eight dollars and eighty-eight cents."

The defendants duly excepted to the decision; and appealed from the judgment to the Court at General Term.

D. B. Eaton, for defendants, (appellants.)

I. If the action had been brought by the people, to whom the bond was made payable, and had been on behalf of all parties interested therein, there would have been plausibility in giving judgment for the whole \$20,000, provided there had been proper provisions for only collecting the amount for which the sureties were really liable, and for the discharge of the judgment at the proper time. But the plaintiff has sued for himself alone, (and not in the name of the people even,) and though his interest in the security is only \$2,468.80, he has an absolute judgment in his favor for \$20,082.64, in addition to the \$2,468.80.

II. There is no provision by which the plaintiff can be compelled to satisfy the \$20,082.64 on the payment of the \$2,468.80; but the larger sum would remain a lien on the property of the defendants.

III. There is no reason perceived why any other creditor may not sue the defendants and recover like judgments, though this excessive judgment remains of record.

IV. Judgment should be given only for the amount really due the plaintiff. (Dayton on Sur., 2d ed., 548.)

H. Brewster, for plaintiff, (respondent.)

The Revised Statutes, as to bonds for performance of covenants, are not repealed, and have been followed here properly; but if not, the party should have raised the question on motion to correct the judgment, not by an appeal on the merits.

BY THE COURT—BOSWORTH, Ch. J. The judgment is in the form prescribed by 2 R. S., 378, § 10, [sec. 9.] That

O'Connor v. Such *et al.*

statute, except as it is modified by the Code, regulates the proceedings to be had in an action upon a bond for the breach of any condition other than the payment of money. This bond is of that character, not containing a condition in terms to pay money. (*Lyon v. Clark*, 4 Seld., 153.)

That statute allows but one suit on the bond; and provides that, if there be further breaches after judgment, a *scire facias* issue on the judgment, &c., and also prescribes the mode of ascertaining thereby the damages. These provisions are intelligible and consistent where the party recovering the judgment is entitled to the damages for the subsequent breaches, or where the action may be brought, and all proceedings had, in the name of the obligee, although different persons are separately interested in the several breaches.

But if every person whom the bond is designed to protect may, in case of a breach violating his rights, sue in his own name and recover a judgment, it would seem that the judgment should be only for the amount of his damages. Otherwise there may be, in form, as many judgments for the amount of the penalty as there are suits and recoveries.

If the suit should have been brought in the name of the people, (the obligees,) the defect appeared on the face of the complaint. The defendants did not demur, but controverted some of the material allegations contained in it. This Court held in *Baggott v. Boulger*, (2 Duer, 160,) on a state of facts quite similar, that this defect, if it be one, cannot be availed of by an objection taken, for the first time, at the trial.

The only objection taken by the appellant on the argument of the appeal, is to the form of the judgment. It is insisted that the judgment should not have been given for the amount of the penalty, but only for the amount of the damages awarded, with costs.

There is no difficulty in assenting to this view, if it be law, that on a further breach occurring to the prejudice of

Connor v. Such *et al.*

the plaintiff, he may bring another action on the bond. It seems to have been assumed in *Baggott v. Boulger*, (2 Duer, 170,) that a new action may be brought on each successive breach, whether the suit be in the name of the people or in the name of the actual party in interest. This, possibly, may not be accurate, if the suit be in the name of the people; and that it may be, has been held, since the decision of *Baggott v. Boulger*, (*supra*), in *The People v. Norton*, 5 Seld., 176.

If a suit on such a bond may still be brought in the name of the people, (and *The People v. Norton*, *supra*, so holds,) there may be some difficulties in the proceedings in respect to breaches occurring after judgment, which the facts in *The People v. Norton* would not necessarily suggest, and which are not considered in that case. The Code, (§ 428,) abolishes the writ of *scire facias*, and provides that the remedies heretofore obtainable in that form, may be obtained by civil action under the provisions of chapter two of title XIII, of part two of the Code.

Section 471, [390,] of the Code does not retain the remedies prescribed by article 2, of title 6, of chap. 6, of part 3 of the Revised Statutes. It is difficult, therefore, to see how any remedies can be had under sections 13 and 14, [sections 12 and 13,] of that article, and it may be that § 428 of the Code would make a new suit necessary, in case of a breach subsequent to judgment. We recently had occasion to consider the effect of that section on the remedy by *scire facias*, as it existed prior to the Code, to revive a judgment. (*Ireland v. Litchfield*, 8 Bosw., 634.)

In this condition of the statutes, and in view of the decisions made under them, I see no objections to holding that the plaintiff may recover in this action the amount to which he is individually entitled by reason of the facts found, and that the judgment should be for that sum, with costs. In the case of an order of the Surrogate requiring different sums to be paid to different creditors, and a total failure to comply with the order, whether all the persons entitled to resort to a remedy upon the bond should unite

Campbell v. Parker:

in the action, or may sue separately, are questions that do not now arise. (See Dayton's Surrogate, [2d ed., p. 548, or 3d ed.,] p. 582.)

The judgment should be amended by striking out the words "twenty thousand dollars of debt," and inserting in lieu thereof the words, "the said sum of two thousand three hundred and eighty-six dollars and twenty-four cents," and by striking out, after the word "allowance," all that follows down to, and including the words "costs of this action," and by adding to the end of the judgment, as it now reads, the words, "and that the plaintiff have execution therefor," and as thus amended, it should be affirmed, without costs of this appeal to either party.

RICHARD CAMPBELL, assignee, &c., Plaintiff and Appellant, v. WILLIAM PARKER, Defendant and Respondent.

1. A mortgage of real property (with the bond to which it is collateral) is the subject of a pledge. Mortgages are now regarded as mere securities and chattel interests, and may be pledged like other chattels and things in action.
2. Where a bond and mortgage are transferred by an assignment absolute on their face, but accompanied by a promissory note, made by the assignor, which gives the assignee authority to sell the bond and mortgage, upon default of the assignor to pay his debt, the transaction is a pledge of the bond and mortgage, and not a mortgage or sale of them.
3. The assignee, in such a case, acquires only a special property in them, and is subject to all the duties and obligations of a pledgee. He has no right to sell them, without, at least, a demand upon the assignor for payment of the debt.
4. Where, in such a case, the pledgee, without demand or notice, transferred the bond and mortgage to a third person, for a sum sufficient to pay the debt, but grossly inadequate to the value of the bond and mortgage, and the latter canceled them: *Held*, that this was a conversion of them, and the pledgee was liable, therefore, in an action in the nature of trover.
5. Such subsequent transfer of the bond and mortgage, having been not a sale but a device to get the mortgage satisfied, and the plaintiff, the assignor,

Campbell v. Parker.

having tendered the debt due, and demanded a reassignment, it is immaterial whether the assignment be regarded as a pledge or a mortgage, for in either case a tender would destroy the pledgee's lien, and trover would lie for the refusal to deliver. Per BOSWORTH, Ch. J.

(Before BOSWORTH, Ch. J., BARBOUR and MONELL, J. J.)

Heard, April 14, 1862; decided, May 24, 1862.

APPEAL from a judgment ordered in favor of the defendant, for costs, on dismissing the complaint, at the trial.

The action was brought for the conversion, by the defendant, of a bond made by Charles H. Kitchel to Ten Eyck and Cochran, (the assignors of the plaintiff,) conditioned to pay, on demand, the sum of four thousand dollars; and also of a mortgage of even date with the bond, upon a house and lot in Brooklyn, which bond and mortgage were alleged to be of the value of four thousand dollars.

In the year 1858, Ten Eyck and Cochran, the mortgagees, borrowed of Kellogg & Parker, (of which firm the defendant was a member,) the sum of \$1,000, and deposited with the defendant, in trust for said Kellogg & Parker, and, as a security for the loan, executed and delivered to the defendant, an assignment, absolute on its face, of the bond and mortgage; and contemporaneously therewith gave the defendant a note, containing a statement of the terms of the loan, with an authority to sell the bond and mortgage, so assigned, upon default of payment of the loan. Ten Eyck and Cochran made a general assignment of all their property, to the plaintiff, for the benefit of creditors. Upon the maturity of the loan, the defendant, without demand or notice to Ten Eyck and Cochran, assigned the bond and mortgage to one Joshua M. Beach, who afterwards satisfied the mortgage of record. After the transfer of the mortgage by the defendant, to Beach, and after the same had been satisfied of record, but before their general assignment to the plaintiff, Ten Eyck and Cochran tendered to the defendant the amount due on the loan; and after the assignment to the plaintiff, and before the commencement of the action, the plaintiff also tendered the amount of the loan to the defendant, and demanded the bond and mortgage.

Campbell v. Parker.

The cause came on for trial before Mr. Justice MONCRIEF and a Jury, on the 17th of December, 1861.

The offer to prove the above facts was overruled by the Justice, on the ground that they did not tend to prove a cause of action against the defendant of the kind and nature alleged in the complaint, or in which a Court sitting as a Court of Common Law could grant relief.

The complaint was dismissed and the plaintiff excepted. The plaintiff further offered to prove, that the defendant did not sell, or offer to sell the bond and mortgage, but concocted the plan with Beach, to enable him to procure the cancelment of the mortgage, and that Beach had some interest, as the real owner, or otherwise, of the property mortgaged. This evidence was also excluded, and the plaintiff excepted.

C. A. Nichols, for plaintiff, (appellant.)

I. The tender by the assignee of the amount due on the bond, and his demand of the same, established an unlawful withholding, which constitutes conversion, and it made no difference that the transfer was absolute on its face. He was equally bound to surrender it upon tender of the amount due, and liable for the consequences of not surrendering it. (*Wilson v. Little*, 2 Comst., 443; *Stearns v. Marsh*, 4 Denio, 228; *Allen v. Dykers*, 3 Hill, 593.)

The bond was an evidence of debt transferable by delivery, and this was the subject of the conversion. The mortgage was only ancillary to the bond, a mere incident of the debt. (*Runyan v. Mersereau*, 11 Johns., 534; *Astor v. Miller*, 2 Paige, 68; *Waring v. Smyth*, 2 Barb. Ch., 119.)

II. The decision that the facts did not warrant an action at common law, necessarily prevented any application to amend the complaint so as to conform the pleadings to the facts, if such amendment was necessary. (Code, § 173; *Rayner v. Clark*, 7 Barb., 582; *Clark v. Dales*, 20 Barb., 67; *Bate v. Graham*, 1 Kern., 237; *Bowdoin v. Colman*, 6 Duer, 187; *Balcom v. Woodruff*, 7 Barb., 13.)

Campbell v. Parker.

III. Such amendment was not necessary ; for defendant is estopped from setting up his own wrong to defeat the action, and the plaintiff is at liberty to treat the refusal to give him possession as the conversion. (*Hall v. Robinson*, 2 Comst., 293 ; *In matter of Brig Sarah Ann*, 2 Summer, 206.)

IV. Were it otherwise, and had it appeared that defendant had actually converted the subject of the action prior to the general assignment to plaintiff, so that the right of action passed to plaintiff, instead of the property in the thing converted, the Court would be bound, in furtherance of justice, to allow at the trial an amendment of the complaint which should conform to such proof.

R. H. Huntley, for defendant, (respondent.)

I. The assignment was a mortgage, and defendant thereby became a *bona fide* mortgagee of the premises described in the mortgage. (*Henry v. Davis*, 7 Johns. Ch., 40; affirmed, 2 Cow., 324; *Slee v. Manhattan Co.*, 1 Paige, 48.)

II. And being a mortgage of real property, and the mortgagee taking a power coupled with an interest in respect to the mortgaged estate, it is not the subject of a conversion, and cannot be. Conversion can only be predicated of goods or personal chattels. (1 Chitty Pl., 146, 147; 3 Black. Com., 152.)

III. A delivery of the bond and mortgage to the plaintiff, by the defendant, would have been of no avail; it was a reassignment, and not a return, that the plaintiff wanted. But this he has not demanded. (*Lutweller v. Linnell*, 12 Barb., 512; *Fuller v. Hubbard*, 6 Cow., 13.)

IV. The remedy of the plaintiff is in equity to redeem; and the Judge was right in holding that the action could not be maintained on the facts presented. (*Slee v. Manhattan Co.*, 1 Paige, 48, 78, 80; *Wilson v. Little*, 2 Comst., 446.)

Campbell v. Parker.

BY THE COURT—MONELL, J. If this action can be maintained for the *conversion* of the bond and mortgage under the facts offered to be proved on the trial, I think the evidence of the conversion was sufficient. The assignment of the bond and mortgage to Beach, without demand or notice to the plaintiff's assignors, was in violation of their rights, and of itself, a conversion. Besides, it put it beyond the defendant's power to reassign, and no demand was necessary. (*Delamater v. Miller*, 1 Cow., 75; *Hall v. Robinson*, 2 Comst., 293; *Dykers v. Allen*, 7 Hill, 498.)

Although the assignment of the bond and mortgage was absolute on its face, yet the contemporaneous note shows conclusively that it was not intended as a sale, but as a security for the loan; and that the assignors designed to retain in themselves the right to redeem upon payment of the sum loaned. It is not to be credited that those mortgagees could have agreed to sell their security, of the value of \$4,000, for the grossly inadequate sum of \$1,000. The sale of it by the defendant, without demand or notice, was an act of great injustice towards the assignors; and no doubt rests in my mind that the law affords them a remedy.

There is no view, it seems to me, in which the transfer of the bond and mortgage by the defendant can be upheld. He made no demand of payment of the sum loaned; he gave no notice of the sale or intended sale; both of which he was bound to do. He sold the bond and mortgage instead of collecting it by foreclosure and sale of the mortgaged premises, and realized the sum of \$1,000 only upon it. (*Wheeler v. Newbould*, 5 Duer, 29.) Thus the rights of the assignors were most grossly violated and invaded.

But the question is, can an action for this unlawful conversion be sustained? or should the plaintiff have resorted to his action in equity, to redeem? The answer to these inquiries depends upon whether a bond and mortgage can be pledged as a security for a debt; for if they can be, then I think the authorities abundantly support the proposition that trover lies.

Campbell v. Parker.

We have not been referred to a case, nor have I been able to find one, where it is held that a mortgage is not the subject of a pledge. It is true, several of the earlier cases in this State held that the assignment of a bond and mortgage as a security for a debt, is, in itself, a mortgage, but that the right to redeem remains in the assignee. Such was the case in *Henry v. Davis*, (7 Johns. Ch., 40,) afterwards affirmed by the Court for the Correction of Errors, (2 Cow., 324.) There the plaintiff assigned the bond and mortgage, by an instrument absolute on its face, but it was agreed that the assignment was to be by way of mortgage; and the defendant gave to the plaintiff a writing to reassign the bond and mortgage, on being paid the sum of \$225, on a day specified. The plaintiff tendered the debt and interest, and demanded a delivery of the bond and mortgage. The defendant refused to assign, having received the amount of the bond and mortgage and canceled the same of record. The bill was to redeem. The Chancellor says: "The original design of the assignment in this case being admitted to be by way of *pledge* or mortgage, for a debt, and this design being contained in a collateral instrument, executed concurrently by the defendant, it seems to put an end to all question *as to the right of redemption*." And nothing more is established in this case. And in affirming the decree of the Chancellor, the Judge delivering the opinion of the Court, (2 Cow., 334,) says: "Without reference to the construction which the law would put on the transaction, I am satisfied that, at the time, neither party considered the assignment an absolute sale. If it was not, the respondent had a *right to redeem*, and is not barred by non-payment at the day." The extent, therefore, of this case is, that the assignment of the bond and mortgage was a pledge or mortgage, in which the assignor had the right to redeem. The *dicta* of "once a mortgage, always a mortgage," has reference to the defeasance contained in it, or in any cotemporaneous instrument, which no agreement of the parties can affect,

Campbell v. Parker.

so as to deprive the party of the right of redemption in a Court of equity.

In *Slee v. Manhattan Company*, (1 Paige, 48,) the complainant had assigned to the defendants a bond and mortgage as a security for a debt, by an absolute assignment, containing a power to collect. The defendants foreclosed and purchased in the property. Subsequently, the complainant filed his bill to redeem. The bill was sustained. It was claimed by the defendants in their answer that the assignment was a sale; but that objection was abandoned. The Chancellor says, "It is now admitted by the defendants' counsel that the assignment to them from Slee, is *on its face nothing but a mortgage*." The whole of the argument of the Chancellor in this case, is to show that Slee, notwithstanding the assignment and the subsequent foreclosure of the mortgage retained in himself the equity of redemption. He treats the assignment throughout as a mortgage, containing the right to redeem, which was not divested by the statute foreclosure. It is to be observed, that both the cases of *Henry v. Davis*, and *Slee v. Manhattan Co.*, arose prior to the Revised Statutes, when the rights of a mortgagee and his assignee were greater than now. Then, the mortgagee on default, could maintain ejectment to recover possession of the mortgaged premises, (*Jackson v. Dubois*, 4 J. R., 216), now he cannot do so. (2 R. S., 312.)

There is nothing in the cases to which I have referred, which declares that a mortgage is not the subject of a pledge. It was not necessary to determine anything more than that the complainant had the right to redeem; and the assignment is variously called a pledge or mortgage as distinguished from a sale, it seemingly being unimportant whether a pledge or a mortgage.

By the common law, a pledge is a bailment of personal property as a security for some debt or engagement. It is usually confined to chattels. Where real or personal property is transferred by a conveyance of the title, as a security, it is commonly denominated a mortgage. (Story

on Bailments, § 286.) In case of a mortgage, the whole legal title passes conditionally to the mortgagee, and if not redeemed at the time stipulated, the title becomes absolute at law. But in a pledge, a special property only, passes to the pledgee, the general property remaining in the pledger. (*Id.*, § 287.) A delivery is essential to a pledge, it was for a long time doubted whether incorporeal things, like debts, money in stocks, &c., which cannot be manually delivered, were proper subjects of a pledge. It is now held that they are. (*Wilson v. Little*, 2 Comst., 443.) Hence, any species of personal property or chattel interest may be the subject of a pledge; and although the pledger parts with the possession of the pledge, he retains his general property in it, and the pledgee has but a special or qualified interest.

Let us now see whether a bond and mortgage is or can be the subject of a pledge. Whatever may have formerly been the law, a mortgage is now regarded as a mere security for the payment of the debt due to the mortgagee; in the language of Mr. Justice STORY, (2 Story Eq., § 1015,) "A mortgage is but a pledge or security for the payment of the debt or the discharge of the other engagements for which it was originally given." In *Green v. Hart*, (1 Johns., 580,) it is said, "Courts of equity consider mortgages according to the essential nature of the contract, and give them operation according to the intention of the parties; the debt is, consequently, then esteemed the principal, and the land the incident; and whenever the debt is discharged, the interest of the mortgagee in the land ceases, of course." So, in *Jackson v. Willard*, 4 Johns., 41, the Court, quoting from Ld. HARDWICKE, who says, "even the law considers the debt as the principal, and the land as an incident only," applies the principles of equity to courts of law, as to the nature and effect of a mortgage. KENT, Ch. J., says, "It has been said, and repeated, that it was an affront to common sense to say that a mortgagor in possession was not the real owner; that the mortgagee, notwithstanding the form, has but a chattel,

Campbell v. Parker.

and the mortgage is only a security." The question in this case was, whether the interest of the mortgagee could be sold under execution. It was held it could not be. That, until foreclosure, or at least until possession taken, the mortgage remained in the light of a *chose in action*. See also, *Runyan v. Mersereau*, (11 Johns., 534.) In *Waring v. Smyth*, (2 Barb. Ch., 119.) After adverting to the restriction of the Revised Statutes in depriving the mortgagee of the power to bring a suit to recover the possession of the mortgaged premises, before a foreclosure, and that the mortgagor is the real owner of the fee, the Chancellor says, "the mortgage, then, is here nothing but a *chose in action*, or a mere lien or security upon the mortgaged premises, as an incident to the debt itself."

In *The Morris Canal and Banking Company v. Fisher*, (1 Stockt. N. J., 667), the stockholders, for the purpose of raising money for certain purposes, authorized their directors to issue the bonds of the company, payable to bearer, to be secured by a mortgage of the canal and appurtenances. The mortgage was executed to three trustees, acknowledged and recorded. Afterwards, the directors authorized the president of the company to borrow \$30,000 on the notes of the company, and to deposit with the notes, as collateral security, the company's mortgage bonds, to twice the amount of the notes. The president borrowed of one Lewis, \$1,500, gave him the company's note for the amount, at eight months, and deposited with him \$3,000 of their mortgage bonds. The note not being paid at maturity, Lewis, after notice to the company, advertised the bonds for sale, and sold them at public auction. The plaintiff (Fisher) bought them at the sale. The defendants having refused to pay the interest on the bonds, the bill was filed for the foreclosure and sale of the canal property and appurtenances. It was claimed that the bonds were not the subject of a pledge; that Lewis could not sell, but could only collect the company's note, and that the company had the right to redeem on paying the \$1,500 and interest. The Court, however, held that the deposit of

Campbell v. Parker.

the bonds was a pledge; that they passed by delivery, and that no assignment in writing was necessary. The defendants further claimed, that even if Fisher had acquired title to the bonds, yet he was not entitled to the benefit of the mortgage security, inasmuch as the mortgage was not assigned, and being a *chose in action*, could not pass by delivery. But the Court says, "it is well settled that the debt secured by the mortgage is the principal thing; the mortgage is only an incident to the debt, and passes with the debt; referring, among others, to *Green v. Hart*, (1 Johns., 580,) and *Langdon v. Buel*, (9 Wend., 80.) I am of opinion that the complainant is entitled to the benefit of the mortgage to the extent of the bonds held by him, and to have the amount due paid by a sale of the mortgaged property." Here, then, both the bonds and the mortgage were regarded as subjects of a pledge, and without assignment in writing passed to the pledgee, subject, of course, to all the usual rights of the pledger.

It seems to me, therefore, that if a mortgage is a "*pledge*" or security for the payment of a debt, a "*chattel*," a mere "*chose in action*," according to the cases to which I have referred, it is necessarily the subject of a pledge; and that the contract by which it is pledged, vests the pledgee with only a qualified and special property in it, the pledger retaining the general ownership.

If I am correct in my conclusion that a mortgage may be pledged, I shall have no difficulty in determining in this case, that it was the intention of the plaintiff to give the defendant only such qualified and restricted property in, and right to, the assigned mortgage, as a pledge would confer.

In *McLean v. Walker*, (10 Johns., 472,) a note was delivered, payable in wheat, with an agreement that the plaintiff might redeem it by paying a certain sum, at any time within six months after the note became due. The Court held it a pledge and not a mortgage; that there was no sale; that it was merely deposited with the party, and that the legal property did not pass, as it does in the case of a mortgage. (See, also, *Stearns v. Marsh*, 4 Denio, 227.)

Campbell v. Parker.

The case of *Wilson v. Little*, (2 Comst., 443,) was in most respects like the present case. There, upon a loan of \$2,000 by the defendant, the plaintiff deposited with him, "*as collateral security*, with authority to sell the same at the brokers' board, or at public auction, on non-performance of this promise, without notice, fifty Erie." The action was for the wrongful selling of these shares. The Court say the transaction was a pledge and not a mortgage; and they reject the idea that it is invariably true, that in all cases where the legal title is transferred to the creditor, the transaction is a mortgage and not a pledge. They held delivery essential to a pledge, but affirm that debts and *choses in action* are capable, by means of a written assignment, of being conveyed in pledge.

The assignment of the bond and mortgage by the plaintiff to the defendant, and the contemporaneous agreement of the parties, constituting, then, the transaction a pledge, the defendant took only such property in the mortgage as an ordinary pledgee acquires, and was subjected to all the duties and obligations imposed upon that class. Upon default in the payment of the sum loaned, he could have demanded payment, and possibly, on giving notice, have sold the mortgage. But he did neither of these. He did not demand payment, as is required by *Wilson v. Little*, *supra*, nor did he sell. He received the grossly inadequate sum of \$1,000, by collusion with Beach; assigned to him the mortgage, who satisfied it of record. Here was a palpable conversion, a tortious and unlawful violation of the rights of the plaintiff, and for the reasons I have before stated; the defendant is liable in this action. (*McLean v. Walker*, and *Wilson v. Little*, *supra*.)

We think the Judge erred in overruling the evidence offered, and in dismissing the complaint.

There should be a new trial, with costs to abide the event.

BARBOUR, J., concurred in this opinion.

The Chief Justice also concurred, assigning the following additional reason for reversal.

BOSWORTH, Ch. J. We are justified in inferring from the facts offered to be proved that the note in this case, made by Ten Eyck & Cochran, is, in terms, like that in *Wilson v. Little*, (2 Comst., 443.)

Where an instrument transferring stock operates as a pledge of it, and not as a mortgage, a transfer of a bond by an instrument in the same form will operate as a pledge of the bond. Though secured by a mortgage of real estate, the bond is the principal and the mortgage is incident to it.

I think, therefore, that the facts offered to be proved would constitute a pledge and not a mortgage. But whether the one or the other, is immaterial in this case, the plaintiff's assignors, and, subsequently, the plaintiff, tendered to the defendant the amount due on the loan, and demanded the bond and mortgage.

The tender destroyed the lien on the bond and mortgage, whether Parker was pledgee or mortgagee; and trover will lie for a refusal to deliver them, or for an actual conversion of them. (*Kortright v. Cady*, 21 N. Y. R., 343.) If ejectment to recover the possession of real estate will lie against a mortgagee in possession, upon a tender of the amount due, made at any time before foreclosure, it needs no argument to show that a tender of the amount secured by a mortgage of chattels will destroy the lien, and authorize a recovery of the chattels, or damages for their conversion.

The proof offered was to the effect that, although the defendant had assigned the bond and mortgage to Joshua M. Beach, yet he did not sell or offer to sell them, "but concocted this plan with Beach to enable him to procure the cancelment of the mortgage," he having an interest in the mortgaged property.

On such a state of facts as the plaintiff offered to prove, his action was maintainable, and the dismissal of his com-

Hoffman et al. v. Miller et al.

plaint was erroneous. The judgment should be reversed and a new trial granted, with costs, to abide the event.

**CHARLES B. HOFFMAN *et al.*, Plaintiffs and Respondents,
v. DANIEL MILLER *et al.*, Defendants and Appellants.**

1. Where bankers and collecting agents receive from their correspondents engaged in the same business at another place, negotiable paper indorsed to them by the latter, the indorsement being expressed to be "for collection," and they do not credit their correspondents with it, but enter it in account as received for collection; and the circumstances and the course of dealing are such that they are not under any obligation to credit their correspondents with its amount until it be paid at maturity, and there is no understanding between them and their correspondents that remittances, or a delay to draw for cash balances, are to be influenced by the fact of holding paper sent for collection and not matured; they cannot, as against the owners who delivered the paper to their correspondents for collection, retain it on the ground of an unpaid balance due to them from such correspondents. Delay to draw for a cash balance, and the making of advances or remittances, after receiving the paper for collection, do not, under such circumstances, make them bona fide holders for value, so as to give them a superior title.
2. In such a case, testimony by the plaintiffs, the collecting agents, that in making remittances after receiving the bill in question, they looked to, and relied on, the unmatured paper in their hands for collection, is not entitled to any weight, if neither any agreement nor the course of dealing between them, authorized them so to rely, and their correspondents had no reason to suspect that any remittance made to them was influenced by any such consideration.
3. The cases of *Warner v. Lee*, (2 Seld., 144,) *Scott v. The Ocean Bank*, (5 Bosw., 192; 23 N. Y. R., 289,) and *The Bank of the Metropolis v. The New England Bank*, (1 How. U. S., 234,) examined, and the two former followed, distinguishing the latter.

(Before BOSWORTH, Ch. J., and BARBOUR and MONELL, J. J.)

Heard, April 21; decided, May 24, 1862.

APPEAL by the defendants from a judgment. This suit was brought by Charles B. Hoffman and John Gelston, on a bill of exchange, dated "Houston, Texas, September 22, 1860," drawn by John Dickinson on Allan Hay & Co., of New York, for \$1,100, payable thirty days after sight, to the order of Miller, Cloud & Miller," and "Accepted

Hoffman et al. v. Miller et al.

October 5, 1860, payable at the Bank of Commerce, in New York." When received by the plaintiffs, the bill had the following indorsements: "Miller, Cloud & Miller;" "Pay Messrs. Hoffman & Co., or order, for collection, Josiah Lee & Co., eleven hundred dollars."

The original defendants in the action were the firm of Allan Hay & Co., the acceptors; but having no defense, except that they were ignorant to whom the bill should be paid, because the plaintiffs, and also Miller, Cloud & Miller, respectively claimed to own it, they were permitted, by an order made in the action, to pay the money into Court, and Miller, Cloud & Miller were made defendants in their stead. The question now was, does the money belong to the plaintiffs, or to the substituted defendants, Miller, Cloud & Miller?

The cause was tried before Mr. Justice ROBERTSON, (a Jury being waived by consent,) on the 20th of November, 1861. It appeared that the plaintiffs' firm, at and prior to receiving the bill, were bankers and collecting agents, doing business in the City of New York; and the firm of Josiah Lee & Co. were also bankers and collecting agents, doing business in the City of Baltimore.

Miller, Cloud & Miller, on the 20th of October, 1860, doing business in Baltimore, and then owning the bill in question, deposited it with Josiah Lee & Co., for collection, at the same time indorsing it, in blank, as before stated. On the 23d of October, 1860, Josiah Lee & Co., after indorsing it in the form mentioned, inclosed that and another bill for \$77.31, in a letter of that date, directed to the plaintiffs, and reading thus:

"Messrs. HOFFMAN & Co.: Dear Sirs—We inclose for collection and credit, bills stated below.

Respectfully, yours,

JOSIAH LEE & Co.

D. S. Cohen,..... \$77 31

Allan Hay & Co.,..... 1,100 00"

The plaintiffs, by letter dated October 24, 1860, replied, (*inter alia*,) as follows:

Hoffman et al. v. Miller et al.

"Messrs. JOSIAH LEE & Co., Baltimore: Dear Sirs—We have received your favor of 23d inst., with inclosures as stated.

\$77.31 to your credit, and

\$1,100 acceptance, Allan Hay & Co., due November 4-7, 1860, which we enter for collection."

Charles B. Hoffman, one of the plaintiffs, and the only witness on their part, testified thus; "There were two accounts in the books of each; we kept an account of all paper sent to them, (Josiah Lee & Co.) and it was called 'our account,' and drafts drawn against it were entered in that account; all paper received from them and drafts against us, constituted the other account, which was called 'their account.'"

On cross-examination he was asked:

"Was the acceptance in suit ever passed to the credit of Josiah Lee & Co., upon your books?"

A. "No, sir; it was never passed upon the ledger; a memorandum of it was kept on the blotter and another small book; it was not our custom to pass paper to the credit of the remitting firm, in those accounts, until the paper matured and was paid, when we passed them on the ledger; of the two acceptances mentioned in the letter of October 22d, one was paid on sight, and immediately passed to the credit of Josiah Lee & Co.; the other, being the acceptance in suit, was treated differently."

[The entry in plaintiffs' blotter was thus:

"351.

October 24, 1860.

"Josiah Lee & Co., Baltimore, (their account.)

"Their remittance on D. P. Cohn,.. \$77 31

\$77 31

"Allan Hay & Co., \$1,100 00"]

Q. "Did you ever draw against any particular remittance, payable in future?

A. No, sir,

Q. Did you consider yourself entitled to draw as against remittances for collection, prior to their maturity?

A. The question never came up.

Hoffman et al. v. Miller et al.

Q. Did you ever do it?

A. No, sir, we never had occasion to do it.

Q. You did, at this time, a general collection business for account of customers?

A. Yes, sir.

Q. Any one that chose to deposit paper with you for collection, you forwarded it for collection?

A. Yes, sir.

Q. Was not that the general business of Josiah Lee & Co.?

A. Yes, sir; that was one branch; they were in the habit of receiving paper from other parties and transmitting it for collection.

Q. Was there any express and positive agreement between you and Josiah Lee & Co., in reference to this acceptance, except by the letter and order given in evidence?

A. No, sir, there was not."

Josiah Lee & Co. failed November 1, 1860, and on the 2d of that month delivered to defendants a written order on the plaintiffs, requiring them to deliver to the defendants the acceptance in question, the order stating, "they (the defendants) being the rightful owners of the same, and we being agents to collect." This order was presented to the plaintiffs, and the acceptance demanded of them before this suit was brought, and they refused to deliver it to the defendants. The plaintiffs received the acceptance on the morning of the 24th of October. On the 23d there was a balance due to them from Josiah

Lee & Co., of,	\$540 28
October 24, plaintiffs paid A. M. Allen, on	
Josiah Lee & Co.'s letter of credit,	200 00
October 24, plaintiffs remitted to Josiah Lee &	
Co., drafts for collection, amounting to,	438 57
October 30, they also remitted to Josiah Lee &	
Co., for collection, a draft for,	3,000 00
They drew on Lee & Co., October 29, for,	600 00
And October 30, for,	3,000 00

Hoffman et al. v. Miller et al.

These drafts were protested; Lee & Co. collected the remittances of October 29th and 30th, and used the proceeds. They now owed the plaintiffs \$3,901.53, excluding from the calculation the acceptance in question.

On the trial, Charles B. Hoffman was allowed, against the objection and exception of the defendants, to testify that for several months "we always took into account the paper that we had on hand, in remitting for collection, or drawing down our balances with them."

The Judge before whom the action was tried, found as facts (among others) that the paper, remitted by the one firm to the other, "always appeared to be the property of the party transmitting the same; each treated the paper so received from the other as the property of the party from whom it was received. * * The plaintiffs, until the 2d of November, 1860, had no notice that said acceptance belonged to any person other than Josiah Lee & Co., and relying upon the possession of said acceptance, and other securities, amounting to \$467.50, they paid the \$200 October 24th, and made the remittances of \$438.67 and \$3,000; and from October 24th to October 29th, left the balance in plaintiffs' favor, arising from the collection of such drafts, and otherwise, in the hands of Josiah Lee & Co., undrawn for." He held, as matters of law, that the plaintiffs, as bankers, have a lien on the bill in question, for the balance due them from Josiah Lee & Co.; and that they have acquired a valid title to the said bill of exchange as bona fide holders thereof for value; and gave judgment for the plaintiffs for the amount of the bill, with interest, and ordered that the money paid into Court by the acceptors, be applied on said judgment. The defendants excepted to these conclusions, and appealed from the judgment to the General Term.

L. B. Woodruff and C. F. Sanford, for appellants.

I. Cited, as to the banker's general lien on securities in his hands, for a general balance due, (2 Kent, 641; 2 Selw., 1385, and cases cited; *McBride v. Farmers' Bank of*

Hoffman *et al.* v. Miller *et al.*

Salem, 25 Barb., 657; *Van Amee v. Bank of Troy*, 8 Barb., 312; *Lawrence v. Stonington Bank*, 6 Conn. R., 521; *Arnold v. Clark*, 1 Sandf., 491; *Scott v. Ocean Bank*, 5 Bosw., 192; 23 N. Y. R., 289; *Clark v. Merchants' Bank*, 1 Sandf., 498; *S. C.*, (reversed,) 2 Comst., 380; *Warner v. Lee*, 2 Seld., 144.)

II. Plaintiffs were not the "bankers" of Josiah Lee & Co., but both were merely agents of the defendants. The acceptance was virtually delivered to the plaintiffs by the defendants. (*Lawrence v. Stonington Bank*, 6 Conn. R., 521.)

III. There is no evidence of any agreement that all remittances should be considered as made upon the faith of any prior remittances, unless notice was given of the interest of others in the first paper remitted.

IV. The plaintiffs' knowledge of the general nature of Josiah Lee & Co.'s business, as collection agents, especially in connection with the indorsements on the bill, the correspondence and the other circumstances of the case, was sufficient to put plaintiffs upon inquiry, and should be deemed notice that the acceptance was held for collection, and that Josiah Lee & Co., were not the owners. (*Van Amee v. Bank of Troy*, *Warner v. Lee*, *Arnold v. Clark*, *supra*.)

V. Knowledge that a great portion of the paper mutually transmitted was not the property of the remitter, of itself, forbade any agreement between plaintiffs and Josiah Lee & Co., the effect of which would be to create a general lien upon all the paper remitted; and such an agreement, if made, being known only to themselves, would have been void against these defendants, who confided to Josiah Lee & Co. the collection of this acceptance, without notice, either express or implied, of the existence of such an agreement, or of their peculiar mode of transacting business. (*Lawrence v. Stonington Bank*, *supra*.)

VI. Nor could such an agreement, though subject to the qualification suggested in the opinion of the Court, viz., that such lien should attach "unless notice was given of the interest of others in the paper remitted," be upheld between dealers mutually cognizant that each acted as the

collection agents for others, as against third parties, where, as in the present case, no distinction between the two classes of paper was ever pointed out or observed in any single instance; where *all* was treated as belonging to the remitting party; where the party claiming the lien does not remember in the whole course of his business of *ever* receiving *any* notice of the interest of others in *any* paper.

William C. Russell and *G. Spring, Jr.*, for respondents.

I. The defendants were guilty of laches in indorsing the draft unrestrictedly and in blank, thereby misleading the plaintiffs into the belief that the paper when remitted to them belonged to Josiah Lee & Co.

The plaintiffs are in nowise in fault; they received this paper in the usual course of their business, and advanced moneys and gave a credit on the faith of it, in good faith and without notice.

II. The plaintiffs, as bankers, have, by law, a lien on this acceptance. (2 Kent's Com., 7th ed., 798, 820, note; *Bank of the Metropolis v. New England Bank*, 1 How. U. S., 234; *S. C.*, 6 How., 212; *Wilson v. Smith*, 3 Id., 763; *Rathbone v. Sanders*, 9 Ind., 217; *McBride v. Farmers' Bank of Salem*, 25 Barb., 657.)

III. Independently of their lien as bankers, the plaintiffs are *bona fide* holders of the acceptance in controversy, and entitled to hold the same against the defendants.

The test of the character of a holder for value is, whether the party claiming it has, in good faith and without notice, so dealt with the paper and upon the security of its possession, that he will be in a worse position than before such dealing, if it be taken away from him. (*Coddington v. Bay*, 20 Johns., 637; *Stalker v. McDonald*, 6 Hill, 93; *McBride v. Farmers' Bank*, 25 Barb., 657, and cases cited under 2d Point; *White v. Springfield Bank*, 3 Sandf., 222; *Youngs v. Lee*, 18 Barb., 187; *S. C.*, 2 Kern., 551.)

IV. The course of dealing between the plaintiff and Lee & Co., proven in this case, and found as matter of fact by the Court below, establishes an agreement between

Hoffman *et al.* v. Miller *et al.*

the parties that all remittances made by either to the other should be considered as made upon the faith of prior remittances by the latter to the former, unless notice was given of the interest of others in the paper first remitted. Such an agreement can be established as thoroughly by a continuous course of dealing, as by express contract in terms. (*Bank Metropolis v. N. E. Bank*, 1 How. U. S., 234; *S. C.*, 6 How., 212; *Scott v. Ocean Bank*, 5 Bosw., 192; *S. C.*, 23 N. Y. R., 289.)

V. The plaintiffs had no notice, when they received the draft in question, that it belonged to any other party than Josiah Lee & Co.

VI. The relations of the plaintiffs and Josiah Lee & Co. in regard to this paper were not those of mere principal and agent. These parties were mutual correspondents, each a principal as to the other, each remitting to the other and drawing drafts, not in reference to any particular remittance, but in reference to general balances and securities in the hands of either, arising from prior remittances.

VII. None of the cases which have been decided in favor of the original owner contain the fact of advances having been made, or securities having been parted with, on the strength of the paper. (*Van Amee v. Bank of Troy*, 8 Barb., 312; *McBride v. Farmers' Bank of Salem*, 25 Id., 657; *Scott v. Ocean Bank*, 5 Bosw., 192, and 23 N. Y. R., 289; *Arnold v. Clark*, 1 Sandf., 491.)

BY THE COURT—BOSWORTH, Ch. J. On the facts, which the evidence will justify a Judge or Jury in finding, we think no discrimination, favorable to the plaintiffs, can be made between this case and *Warner v. Lee*, (2 Seld., 144,) and *Scott v. The Ocean Bank*, (5 Bosw., 192, and 23 N. Y. R., 289.)

In *Warner v. Lee*, John T. Smith & Co., with whom the plaintiffs had deposited for collection a note owned by them, made by Osborn & Whallon, sent it in a letter to the defendant, a banker, which letter stated that it was "inclosed for collection." In the present case, the indors-

ment to the plaintiffs stated that it was "for collection." The letter inclosing it (and another draft) stated that they were inclosed "for collection and credit." This, in the light of the evidence given, means that the draft for \$77.31 was inclosed to be credited to Josiah Lee & Co., and the one for \$1,100, for collection. The small one was paid at sight, and was credited to Josiah Lee & Co. The large one — the one in question — was entered on the plaintiffs' blotter as received for collection, and was never otherwise credited to Josiah Lee & Co.

In *Warner v. Lee*, the plaintiffs had received no advances from John T. Smith & Co. The present defendants received none from Josiah Lee & Co.

In *Warner v. Lee*, Smith & Co. were largely engaged in making collections of notes for merchants in New York, and the defendant was aware of that fact. In the present case, Lee & Co. "were in the habit of receiving paper from other parties, and transmitting it for collection." One of the plaintiffs so testifies, and, of course, he was aware of that fact.

In each case the accruing balances were collected in a similar manner.

In *Warner v. Lee*, the Referee did not find that any advances were made by defendant to John T. Smith & Co., on the credit of the note there in question. In the present case, the Judge has found, that the plaintiffs made advances to Josiah Lee & Co., on the credit of the acceptance in question. We shall attempt to show that this finding is not warranted by the evidence. Assuming, for the present, that this is susceptible of demonstration, then there is no difference between the facts of these two cases, except that, in *Warner v. Lee*, the note there in question was collected, and the proceeds received by the defendant, before any formal notice was given to him that the note was not the property of Smith & Co.; while, in the present case, the plaintiffs did not collect the acceptance in question, and had formal notice before this suit was commenced, that it was the property of the defendants.

Hoffman et al. v. Miller et al.

In *Warner v. Lee*, the Court said, that "when the defendant received this note, he had notice, from its indorsement, from the course of business of Smith & Co., with which he was acquainted, and from the letter which inclosed the note to him, that it was placed in their hands for collection only, on account of the owners, the plaintiffs in this suit. Under these circumstances, if he had made advances upon account of it, he could not have held the note nor its proceeds, against the plaintiffs. (*Clark v. Merchants' Bank*, 2 Comst., 380.)"

In the present case, the plaintiff had the same notice, except such as the indorsement furnished. In *Warner v. Lee*, the plaintiffs indorsed the note in blank on delivering it to Smith & Co., and they filled up the blank indorsement with the defendant's name; whereby it was, in form, specially indorsed by the plaintiffs to the defendant. In the present case, the blank indorsement of the defendants was left as they wrote it, and Josiah Lee & Co. wrote under it a special indorsement by themselves to the plaintiffs, in terms stating it was for collection. The present plaintiffs had notice, therefore, that Lee & Co. had received it for collection, that they sent it for collection for the owners; and the natural inference would be that the payees were the owners, it being indorsed only by them, and by Josiah Lee & Co. *Arnold v. Clark*, (1 Sandf. S. C. R., 491,) supports these views. If it be thought that the decision in *Warner v. Lee* conflicts with that in *The Bank of the Metropolis v. The New England Bank*, (1 How. U. S. R., 234,) it would, nevertheless, be our duty to follow it, it being the decision of the Court of last resort of this State, and controlling upon us. The latter case was cited in *Warner v. Lee*, (2 Seld., 146,) and of course was not overlooked.

In *Clark v. The Merchants' Bank*, (2 Comst., 380,) the Court treated the material and controlling question as being, "whether the bill in question was transmitted to Smith & Co., for collection merely, or was to be credited to the plaintiffs when received by the former, whether

Hoffman et al. v. Miller et al.

collected or not." (Id.) And to complete the statement of the material elements entering into the question, GARDINER, J., added: "As the bill was indorsed in blank by the plaintiffs, the legal title passed to Smith & Co. *prima facie*, and the plaintiffs must establish the fact that it was indorsed and forwarded for the purpose of collection."

In the present case, the plaintiffs have proved by evidence which is uncontradicted, that Miller, Cloud & Miller deposited the bill with Josiah Lee & Co. for collection; that the latter indorsed it specially to the present plaintiffs, and stated in the indorsement itself that they indorsed it to the plaintiffs for collection, and that the plaintiffs, on receiving it, entered it in their books as having been received for collection, and, by letter to Josiah Lee & Co., informed them that they had entered it for collection.

In *Clark v. The Merchants' Bank*, (*supra*,) GARDINER, J., discusses the evidence therein, as to the classes of funds remitted, and came to the conclusion that one class was remitted to be credited as cash when received, and to be drawn against, whether paid or not, at the time of so drawing; and that another class was remitted for collection, and was not to be credited or drawn against, until actually paid.

As to the class which was to be credited as cash when received, the Court held that the title passed to John T. Smith & Co., on their reception of the same, and that their application of the proceeds to the payment of their own debt, could not be questioned in a suit against creditors (of John T. Smith & Co.) receiving them in good faith.

The error of the Court below was stated to consist in the assumption "that nothing went into account properly" until collected in the course of business, (or in other words that nothing was to be credited as cash when received.) (Id., 385.) GARDINER, J., summarily states the position of the parties, *inter se*, with reference to the different classes of remittances, thus: "For the first class they were to be credited, with the right to draw upon their correspondents; as to the second and third, the New York

firm were the agents of the plaintiffs, and had no other interest in, and control over, the assets, than such as was necessary to the discharge of their agency." *Id.*, 385.

In *Scott v. The Ocean Bank*, (5 Bosw., 192, and 23 N. Y. R., 289,) the Court held, that :

1. The property in notes or bills transmitted to a banker by his customer, to be credited the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor.

2. Such an obligation, previous to the collection of the bill, can only be established by a contract to be expressly proved, or inferred from an unequivocal course of dealing.

That case, in all of its material facts, bears a close resemblance to the one before us. And the Court of Appeals says: "When, therefore, it appears that the bill in question was retained in the possession of the company, (the party to whom it was sent for collection,) after its acceptance, and that no credit had been given for it at the time it was passed to the defendants, and when nothing is disclosed in the whole course of dealings between the parties to show that any bill was ever credited or agreed to be credited in account, before its collection, or that Lyell (the remitter) ever drew or was entitled to draw on the company, or that it was bound to accept drafts otherwise than upon and for funds actually received in cash, it must be considered that the company, at the time of the transfer, stood in the relation of agents for its collection merely." In that case, the defendants received the bill from the company to secure a pre-existing indebtedness, and credited its proceeds to the company after it was paid, and they were held liable to the plaintiff for its amount.

If, therefore, it is clear upon the evidence that the present plaintiffs did not, and were not under any obligation to credit the bill in question to Josiah Lee & Co., when received, and that there was no agreement or understanding between them that remittances for collection, or a delay to draw for cash balances, was to be based upon or influenced by the consideration of holding paper sent for

Hoffman et al. v. Miller et al.

collection and not matured, then it will follow that the judgment in this case is in conflict with *Warner v. Lee*, and *Scott v. The Ocean Bank*, (*supra*.)

With reference to this question, it may be observed, first, that the learned Judge who tried this cause states in his opinion "that the only ground upon which the plaintiff's claim can rest, is a mutual agreement between themselves and Josiah Lee & Co., that all remittances, made by either to the other, should be considered as made upon the faith of any prior remittances by the latter to the former, unless notice was given of the interest of others in the paper first remitted;" and, second, that the learned Judge did not find as a fact that any such agreement was ever made.

There is no evidence that any express agreement to that effect was ever made. And we think it quite clear that no such agreement can be inferred from the course of dealing between those parties.

Charles B. Hoffman, one of the plaintiffs, testified as to the course of dealing between his firm of Josiah Lee & Co., thus: "We remitted to them, and they to us; they kept an account with us, and we with them; they drew upon us, and we upon them; sent paper for collection, and so on; their remittances to us, if at sight, were collected at once and passed to their credit; the same course was pursued with the paper we sent them." That the question whether the plaintiffs "were entitled to draw as against remittances for collection before their maturity," "never came up;" that they never did it, nor had occasion to do it; and that he does not remember that his firm ever drew "otherwise than against balances" of collections actually made.

The only circumstances furnishing any evidence of any exception to this, as the uniform course of business, is in the testimony of Mr. Hoffman, to the effect that he remembered "one instance where we (his firm) paid a large overdraft by them," (Josiah Lee & Co.) By overdraft, as here spoken of, we understand a draft for a

Hoffman et al. v. Miller et al.

larger amount than the cash balance then standing to the credit of Josiah Lee & Co. Mr. Hoffman testifies, that neither firm was "ever under obligation to pay any such draft," and that he thinks there were two or three instances of overdrafts by Josiah Lee & Co.

In opposition to this exceptional transaction, and in support of the understanding being in accordance with that indicated by the usual and common course of their business, is the fact that bills on time, when received, were entered in the books of the plaintiffs as having been received for collection, and were never otherwise credited, until actually collected; that the bill in question was sent, entered, and by plaintiffs' letter is admitted to have been received, for collection, and never was otherwise credited to Josiah Lee & Co.

This evidence does not in any manner justify the finding of such an agreement as the Court at Special Term held it essential for the plaintiffs to establish in order to recover; nor does it furnish any evidence of an obligation on the part of the plaintiffs, to give credit to Josiah Lee & Co. for it, until actually paid; or of any assent on their part that it, or other bills received under like circumstances, should be held by the plaintiffs as security for remittances subsequently made by them, or for the payment of any cash balance in their favor, that might then happen to exist, or might subsequently accrue.

Under such circumstances, evidence by Mr. Hoffman, "that we (his firm) always took into account the paper that we had on hand, in remitting for collection or drawing down our balances with them, at least we did for several months," should not be allowed any weight.

The answer imports that this mental operation to which he testifies, was of late occurrence and short duration; there is no pretense that it had been disclosed to Josiah Lee & Co., or was authorized or suspected by them, and so long as it is essential to a valid agreement that there should be at least two parties to it, evidence of what the plaintiffs "took into account or consideration," or "looked

to very closely and relied upon," in making remittances or delaying to draw cash balances, should be disregarded when it is clear that it was unauthorized, and that Josiah Lee & Co. had not the slightest reason to suspect anything of the kind.

We think, therefore, that no discrimination favorable to the plaintiffs, can be made between this case and *Warner v. Lee*, and *Scott v. The Ocean Bank*, (*supra*;) that on the evidence, it is clear that the plaintiffs received the bill for collection, and knowing that Josiah Lee & Co., received and forwarded to them for collection, paper belonging to third persons, as well as paper owned by themselves; that Lee & Co. were not entitled to be credited with the bill until actually collected; and that there is no evidence justifying the claim of a mutual agreement or understanding that remittances for collection by either, were made on the faith and security of paper in their hands, not matured and previously received for the like purpose, from the house to which such remittances were made.

We do not deem it material or useful to attempt to discriminate between *The Bank of the Metropolis v. The New England Bank*, and *Warner v. Lee*, or *Scott v. The Ocean Bank*, (*supra*.) If it be supposed that no material difference exists, it is none the less our duty to conform our decision to the law, as declared by the Court of dernier resort of this State.

It is not to be denied, however much it is to be regretted, that there is an apparent conflict between the Courts of this and other States, as to the circumstances sufficient to constitute an indorser of paper a *bona fide* holder for value, so as to exclude the equities of third persons, or defenses that could be made in a suit between the original parties. (*Stalker v. McDonald*, 6 Hill, 93; *Warner v. Lee*; *Scott v. The Ocean Bank*, *supra*; *Swift v. Tyson*, 16 Peters, 1; *Le Breton v. Pierce*, vol. 9, Am. L. R., 737, and note thereto, in vol. 1, Id., N. S., p. 35.)

It may be observed, however, that the head note in *Swift v. Tyson*, enunciates no rule in conflict with the

decisions in this State, and if the fact was proved in that case, (as asserted in the argument of Mr. Fessenden,) viz.: "That on receiving the acceptance, he (the plaintiff) had given up the note of Norton & Keith, which had been indorsed by one Child," the decision is in harmony with those of this State.

The learned author of the note upon *Le Breton v. Pierce*, (1 Am. L. B., N. S., p. 38,) states that "it has always seemed to us that most of the controversy upon this subject has grown out of the different sense in which the terms are understood. If the term 'collateral' is understood to import that the bills thus held are not taken on account of the existing debt, but only to be held until due, and if paid, the amount to be applied, and in the meantime the creditor assumes no responsibility in regard to them, except as the mere agent of the debtor for collection, there could be no ground of claim that any property passed, or that existing equities in former parties were extinguished."

In *The Bank of the Metropolis v. The Bank of New England*, (*supra*,) the Court says: "There does not, indeed, appear to be any express agreement that those balances should not be immediately drawn for, but it may be implied, from the manner in which the business was conducted; and if the accounts show that it was their practice and understanding to allow them to stand and await the collection of the paper remitted, the rights of the parties are the same as if there had been a positive and express agreement." This seems to hold that either an express agreement, or one justly inferable from competent evidence, of the actual understanding of the parties, of the character stated, would make a holder of bills, received under that agreement, a holder for value to the extent of any balance due to him.

This may be conceded to be law, and yet, if we have taken a correct view of the evidence in the present case, and of its legal effect, the plaintiffs have failed to bring themselves within this rule. They have not shown an express agreement of this character; they have not fur-

Bronner v. Frauenthal.

nished any evidence that it was their practice, or the understanding between them and Josiah Lee & Co., that cash balances should stand and await the collection of paper remitted to the party in whose favor a balance might exist.

The judgment must be reversed and a new trial granted, with costs to abide the event.

Ordered accordingly.

**ISAAC H., SECKEL and BERNHARD BRONNER, Plaintiffs
and Respondents, v. SAMUEL FRAUENTHAL, Defendant
and Appellant.**

1. In an action to recover for goods sold, the defense being that the sale was not to the defendant, but to one L., it appeared that the plaintiffs, deeming L. to be irresponsible, had refused to sell to him on credit, without security, and he, accordingly, brought the defendant to them as his security, whereupon the defendant bought the goods for L., and they were charged to the defendant. At the trial, a witness to the transaction was asked to state whether he knew, when L. came there, anything concerning his responsibility, and if so, whether he, the witness, made any communication on that subject to the plaintiff?

Held, that it was not an objection to this question that the defendant was not shown to have been present. The communication, if any, was one proper to be privately made, and the presence of defendant is immaterial. (BARBOUR, J., dissented.)

2. *It seems* that the question is proper, on the ground that evidence having been given by defendant, tending to show that plaintiffs were willing to sell to L., it was competent for them to show that they did not believe him responsible.
3. Where one witness, being asked where was a note he had indorsed, and which had been delivered back to him, testified: "I don't know; I expect it is destroyed; after I got it back I tore my name off; I have not got it," and another witness testified that he once saw the note at a banking house: *Held*, that parol evidence as to what the indorsement was, was not admissible, without further proof that the note was destroyed or lost.
4. A witness having testified that a sale of goods by plaintiffs on credit, was to him, and not to defendant, and that his credit was ample at the time of

Bronner v. Frauenthal

sale; was cross-examined as to judgments against him, and, without objection being made, answered as to them in detail, and identified all the judgment rolls.

Held, that this made it proper to admit the judgment rolls in evidence, both as contradicting the witness and as tending to disprove that the sale was to him.

(Before BOSWORTH, Ch. J., BARBOUR and MONELL, J. J.)

Heard, April 23; decided, June 14, 1862.

THIS was an appeal by the defendant from a judgment in favor of the plaintiffs for \$1,258.54.

The action was to recover \$759.26 for goods sold and delivered by the plaintiffs to the defendant, between the first of September and first of December, 1856. The complaint, after averring the sale, &c., of the goods, also alleged that the plaintiffs were induced to sell the goods upon the representations of the defendant that he was the owner of two houses and lots in Wilkesbarre, Pennsylvania, which were unincumbered, and worth at least \$5,000, and that the defendant was worth more than \$15,000, over all his debts; which representations the plaintiffs alleged were untrue.

The defendant, in his answer, denied the sale of the goods to him, but admitted a sale at about that time, of goods to the amount of \$230.44, which he alleged he had paid. He further denied the representations alleged in the complaint. He alleged that, at or about the time stated in the complaint, the plaintiffs sold and delivered to one Samuel Lowenstien goods amounting to \$759.26, and that such sale was the same transaction as the sale mentioned in the complaint, as made to the defendant. The defendant further alleged that in November, 1857, the plaintiffs made a general assignment of all their property to one M. Bronner, whereby the demand mentioned in the complaint passed to the assignee, and the plaintiffs thereafter ceased to be the owners thereof. That the assignee, in December, 1857, for a valuable consideration, sold and transferred the said demand to one Joseph Lowenstein, who afterwards settled the same with Samuel Lowenstein,

Bronner v. Frauenthal.

and that at the commencement of the action the demand was paid.

The action was tried before Mr. Justice WOODRUFF and a Jury, on the 13th of December, 1860.

Exceptions were taken by the defendant to the admission and exclusion of evidence.

The Jury rendered a verdict for the plaintiffs for \$945.25, upon which judgment was entered, with costs.

T. C. T. Bulkley, for defendant, (appellant.)

Solomon L. Hull, for plaintiffs, (respondents.)

BY THE COURT—MONELL, J. The defense was two-fold: First, that the sale was to Samuel Lowenstein, and not to the defendant; and second, that the plaintiffs' assignee had transferred the demand to Joseph Lowenstein, to whom Samuel had paid it. Upon both these issues the Jury have found against the defendant. No question, therefore, arises on the facts.

The first exception taken by the defendant was to allowing the following question to be put to the witness Bishop: "State whether you knew when Lowenstein came there, anything concerning his responsibility, and if so, whether you made any communication on that subject to the plaintiffs?" The only objection to this question was, "that the defendant was not shown to be present." The case shows that Samuel Lowenstein applied to the plaintiffs to purchase goods. The plaintiffs, deeming him irresponsible, declined to sell, unless he would give security. Subsequently, on the same day, he brought the defendant to the plaintiffs' store, and offered him as security. The plaintiffs objecting that a verbal agreement to guarantee would be void, the defendant directed the goods to be sent to Lowenstein and charged to him, the defendant. The goods were so sent and charged. The Jury, by their verdict, have so found from the evidence.

Bishop was a witness for the plaintiffs, and had testified that Lowenstein came to the plaintiffs' store to purchase

goods, and offered to give security; that on the same day he came again with the defendant, whom he offered as security. The question related to the communication of Bishop's knowledge of Lowenstein's irresponsibility, to the plaintiffs, and must have had reference, in point of time, to the occasion of Lowenstein's first call at the plaintiffs' store. It was at that time that he inquired if the plaintiffs would sell to him, if he would give security. It is not pretended that the defendant was then present. He had not then been brought into the transaction, and could not be affected or influenced by any conversation between the witness and his employees. It was a confidential communication to the plaintiffs, from which they were to decide whether to give or decline the credit asked by Lowenstein, and the presence or otherwise of the defendant would be no reason for excluding the evidence. If the communication was proper to be made to the plaintiffs, it was proper it should be made privately, nor was it necessary to show that it was made in the presence of either Lowenstein or the defendant. Indeed, we feel authorized to infer that it was not made in the presence of either. That it was confidential, and was privately made, is to be presumed from its nature, which related to the credit of Lowenstein. It is enough that the defendant was not present, or, if present, had incurred no liability, and that it does not appear that he was influenced, or could have been influenced, in the subsequent part he took in the transactions, by anything that passed between the witness and the plaintiffs. This disposes of the objection on the only ground taken by the defendant. Upon a bill of exceptions we cannot look into grounds not taken at the trial. (*Whiteside v. Jackson*, 1 Wend., 418; *Newton v. Harris*, 2 Seld., 345.)

But I think the question put to the witness was proper, for another reason. The question before the Jury was, whether the sale was to the defendant or to Lowenstein. The defendant had given evidence which, unexplained, tended to show that the sale was to Lowenstein, and that

Bronner v. Frauenthal.

the plaintiffs were willing to trust him, believing him to be responsible. It was entirely competent, it seems to us, for the plaintiffs to contradict this evidence and to show that they did not believe Lowenstein was responsible. The communication of Bishop was at least some evidence bearing on that question, and tended to show that the plaintiffs were not willing to trust Lowenstein. The defendant had himself opened the way for this inquiry, and could not close it to the plaintiffs. We, therefore, see no objection to the question.

It was objected by the defendant, that the question put to the witness, Samuel Lowenstein, "by whom was the note you saw in Rochester indorsed?" was improperly excluded. The defendant had given in evidence a bill of sale from M. Bronner, plaintiffs' assignee, to Joseph Lowenstein, of accounts against Samuel Lowenstein, under dates from September to November, 1856, inclusive, amounting to \$759.26, and acknowledging payment by four notes for \$189.82 each, at 2, 4, 6 and 8 months. This bill of sale was signed by Seckel Bronner, in the name of M. Bronner, assignee, but without the consent, knowledge or authority of the assignee. The defendant did not show that these notes, or either of them, were ever delivered to the assignee; on the contrary, it was expressly proved that the assignee repudiated the sale, and refused to receive the notes. Meyer, one of the defendant's witnesses, testified, that he negotiated the purchase of the accounts with Mr. Fulda, who was the payee and indorser of the notes; that after the assignee refused to receive the notes, he returned them to Fulda, from whom he had received them. The first of the four notes was the one to which the inquiry related. Fulda testified that he did not know where it was. He says, "I expect it is destroyed; after I got it back, I tore my name off; I don't know where it is now; I have not got it." Samuel Lowenstein swears that he saw the note in Husband & Shirliff's banking house in Rochester; but whether before or after Fulda "expected" it was destroyed does not

Bronner v. Frauenthal.

appear. The objection to the question was, that the loss of the note had not been sufficiently proven to let in secondary evidence. I think the evidence failed to prove that the note was destroyed or lost. It was shown to have been last, either in Fulda's possession or in Husband & Shirliff's banking house. Fulda expected it was destroyed. He tore off his name, but did not know where it was. It may have been, and for ought that appears, was, afterwards, in the banking house in Rochester, and I think the defendant was bound to have shown that search had been made for it in the latter place, and that it could not be found. The loss was a question for the Court and not for the Jury, and I think, on the evidence, the decision sustaining the objection was correct. It is difficult to see the materiality of the evidence sought by the question. The testimony was very strong, if not overwhelming, that the note was not in the plaintiffs' possession, nor in possession of their assignee. Any evidence, therefore, in regard to it, does not seem to have been pertinent to the issue the Jury were trying. Such objection, however, was not taken.

The objection to the reading of the deposition of the witness Fulda, on the ground that his absence at the time of the trial was not sufficiently proved, is removed by the case of *Donnell v. Walsh*, (6 Bosw., 621), and was substantially abandoned on the argument.

The only remaining objections urged on the argument, to which exceptions were taken, were to the admission of judgment rolls, of judgments recovered against Samuel Lowenstein, about the time of the sale of the goods, upon indebtedness incurred by him anterior thereto. The objections were, first, that if they were offered to contradict Lowenstein, his attention had not been sufficiently called to them; and second, that they were on a collateral issue. Samuel Lowenstein, the judgment debtor, was under a cross-examination by the plaintiffs' counsel. He had testified on his direct examination, that he had purchased the goods in question; that they were sold to him, and not to

Bronner v. Frauenthal

the defendant, and that he was urged by the plaintiffs to buy the goods on six months credit. On being asked if anything was said by Bronner or the defendant, to the effect that any goods sold to him should be charged to the defendant, he said no; that he would not have bought goods under that condition, he had credit enough for all he wanted. On his cross-examination, he was interrogated in regard to his responsibility at the time of sale, and was asked without objection, in regard to the several judgments. The judgment rolls were shown to the witness, who answered variously to them, that they were not for his debts, or not against him, or had been arranged, giving explanations in respect to all or most of them. All the rolls were identified by the witness, and he was subjected to a lengthy examination in reference to the judgments, and the debts upon which they were recovered. The object of this examination, doubtless, was to affect and discredit the testimony of Lowenstein, that he was urged to buy on six months credit, or that he had credit enough for all he wanted, by showing that at the time of the sale he was largely in debt and irresponsible. It was legitimate, it seems to me, for such purpose. At the close of his examination, which had been taken without objection, the judgment rolls which had previously been shown the witness and identified by him, also without objection, were offered in evidence. They were clearly proper. If for no other reason, the previous examination had made them so. After having been testified to by the witness, they became the best evidence, and were entitled to go to the Jury as evidence, both contradicting the witness and as tending to disprove the allegations of a sale to Lowenstein. The first branch of the objection that the witness' attention had not been sufficiently called to them, has no foundation in fact, and the second, that they were upon a collateral issue, is equally untenable. They bore with force upon the principal questions the Jury were to decide.

The judgment should be affirmed with costs.

BARBOUR, J. I cannot concur in the opinion affirming the judgment in this case.

It appears to me that the admission of the testimony of Bishop, touching the communication made by him to the plaintiffs, in the absence of the defendant, respecting the pecuniary standing of Lowenstein, was improper. The only real question in regard to that matter was, whether the plaintiffs refused to sell goods to him upon a credit; and, it may be added, that even this was merely collateral to the main issue in the case; that is, whether the goods were, or were not, sold by the plaintiffs to the defendant. The object of the question, and the effect of the answer upon the Jury, were, probably, to convince them that such communication must so have operated upon the minds of the plaintiffs that it could not, reasonably, be supposed they afterwards sold the goods to him upon credit. The workings of the plaintiffs' minds upon the subject, or, in other words, their reasons for refusing to sell to Lowenstein, could not, properly, have been given in evidence, even by the plaintiffs themselves; which would, certainly, have been the best evidence; and, *a fortiori*, they cannot, legally, be established by extrinsic circumstances, though leading to that result, as an almost inevitable conclusion, through a course of reasoning.

If the probable effect of the testimony upon the conclusions of the Jury was such as is above intimated, and I cannot see how it could have been otherwise, its admission was important, inasmuch as the evidence, upon that subject, given by the plaintiffs and the defendant, respectively, was conflicting, and, to some extent, therefore, balanced, and this, it may safely be assumed, turned the scale. At least, it may have done so, and that is sufficient.

I think the judgment ought to be reversed, and a new trial granted.

Judgment affirmed.

JACOB C. COOK *et al.*, Plaintiffs and Appellants, v. JOHN KELLY, Sheriff of the City and County of New York, Defendant and Respondent.

1. Where a factor, having possession of goods consigned to him, on which he has a lien for charges, makes a valid general assignment for the benefit of his creditors, and delivers such goods to his assignee, and they are subsequently seized by the Sheriff under process against the factor, the assignee is the proper person to whom the owner of the goods should tender the charges, in order to acquire a right to their possession.
2. The owner having made such tender to the assignee, and having taken the goods from the Sheriff's possession, a subsequent retaking of them by the Sheriff is tortious, and makes him liable to an action for their conversion.
3. The testimony of a witness, that himself and partner, having a special property in certain goods, executed a chattel mortgage thereon, which he thought was not delivered, without proof of delivery of the goods or the filing of the mortgage, is not evidence of a mortgage which will affect the rights of the general owner of the goods or of the mortgagor's assignee.

(Before all the Justices.)

Heard, May 24, 1862; decided June 14, 1862.

THIS action was brought by Jacob C. Cook and Andrew Nellis, to recover damages for taking and converting to the use of the defendant twenty-five bales of hops. The goods in question, in November, 1858, belonged to the plaintiffs, and were then sent by them from Montgomery county, in this State, to a firm in New York named Harvey & Dunn, to be sold on commission, receiving from them, as an advance thereon, their acceptance of a draft for \$300, dated November 22d, 1858, and payable ninety days after date, to the order of a Mr. Young. Harvey & Dunn also paid nearly fifteen dollars for freight on such goods, and received them into their store, where they remained until seized by the defendant. In 1859, on the 23d of February, Harvey & Dunn made an assignment of all their property to an assignee, (Runyon,) and put the goods in question in his possession, telling him they were commission goods. On the next day, (the 24th of February,) two warrants of attachment were issued out of the Marine Court of this city, against the property of Harvey & Dunn, by virtue

Cook *et al.* v. Kelly.

whereof the defendant, who was Sheriff of the City and County of New York, on the same day seized the hops in question. The draft became due on the 23d of February, when it was protested, but was paid by the plaintiffs within a day or two afterwards. In March following, the plaintiffs tendered to the assignee, Runyon, the amount of freight paid by Harvey & Dunn, and their charge for storage, and offered to deliver them such draft; they then obtained possession of the goods during the absence of the defendant's storekeeper, and removed them to another store, where the defendant repossessed himself of them.

Judgments were obtained in the actions in which such attachments were issued, and executions issued thereon, under which the defendant held such goods at the time of the commencement of this action, and sold the same during its pendency. One of the firm of Harvey & Dunn testified that on the 23d of February, 1859, whether before or after the assignment to Runyon did not appear, himself and partner executed a mortgage of the hops in question to Messrs. Gardner & Myer, which he thought was not delivered, to secure them for certain liabilities assumed by them to a creditor of the former, as sureties for the mortgagors, to be payable on demand, after their payment of any sums as such sureties. There was no other evidence of its delivery, and no evidence of any delivery of the hops, or record of the mortgage.

On the trial, before Mr. Justice MONCREEF and a Jury, March 18, 1861, the complaint was dismissed, to which decision the plaintiffs' counsel excepted. A new trial was moved for at Special Term, and denied.

L. S. Chatfield, for plaintiffs, appellants, argued that the mortgage was unauthorized and could not bind the goods; that the title was in the plaintiffs, not in the consignees, citing *Winter v. Coit*, (3 Seld., 288,) *Covell v. Hill*, 2 Id., 374,) *Gardiner v. Suydam*, (3 Id., 357.) That the consignees' lien was not a leviable interest, *Ransom v. Miner*, (3 Sandf., 692,) *Grosvenor v. Allen*, (Clarke, 275.)

Cook et al. v. Kelly.

Wilkes v. Ferris, (5 Johns., 335,) *Handy v. Dobbin*, (12 Id., 220,) *Holmes v. Nuncaster*, (Id., 395,) *Bogert v. Perry*, (17 Id., 351,) *Denton v. Livingston*, (9 Id., 96,) *Ingalls v. Lord*, (1 Cow., 240,) *Ferguson v. Lee*, (9 Wend., 258,) *Bailey v. Burton*, (8 Id., 339;) that if they had an interest it passed to the assignee, and was satisfied by the tender, citing 2 Rev. Stat., 4th ed., 184; *Gouverneur v. Warner*, (2 Sandf., 624;) and that the case was therefore the ordinary case of trespass or trover against the Sheriff for seizing the goods of A. to satisfy the debt of B., and such an action can always be maintained. (*Chitty's Pl.*, 129, 130; *Wintringham v. Lafoy*, 7 Cow., 735; 10 Wend., 349; 4 Johns., 450; 8 Wend., 610; *Stimpson v. Reynolds*, 14 Barb., 506.)

The second seizure, after the owner had obtained peaceable possession, was a trespass for which this action will lie. (*Hall v. Tuttle*, 2 Wend., 475.)

A. J. Vanderpool, for defendant, respondent, — To the point that the right of the consignees was leviable, cited *Saul v. Kruger*, (9 How. Pr., 569,) 3 R. S. 76, § 1, 5th ed., and insisted that the tender to Runyon could not affect the rights of the Sheriff.

ROBERTSON, J. At the time of the tender to Runyon, he was entitled to the possession of the goods in question, if he was *bona fide* assignee, as against every one but the plaintiffs. The plaintiffs were entitled to the possession as against every one but him, if he was the lawful assignee of the claim of Harvey & Dunn. The assignment to him being *prima facie* valid, and no evidence offered impeaching it, he was the proper person to whom to make such tender, and upon that tender the plaintiffs' right to the possession was complete and free from any incumbrance. (*Kortright v. Cady*, 21 N. Y. R., 343.)

The subsequent taking of the hops by the defendant was tortious, and makes him liable, in this action, for their value.

There was no evidence of any delivery of the hops in

Swinnerton et al. v The Columbian Insurance Company.

question to the mortgagees, or filing of the mortgage to Gardiner & Myers, or even of its delivery, the only witness examined as to its execution, testified that he thought it was not delivered; and it was therefore inoperative as against the assignee or these plaintiffs.

The judgment, therefore, ought to be reversed and a new trial take place, with costs to abide the event.

BOSWORTH, Ch. J., concurred in this opinion.

BARBOUR, J., concurred in the conclusion.

SAMUEL A. SWINNERTON *et al.*, Plaintiffs and Respondents, v. THE COLUMBIAN INSURANCE COMPANY, Defendants and Appellants.

1. In an action to recover on a policy of insurance on a vessel, the plaintiff proved, among other things necessary to make out their case, that the vessel, being at the port of Norfolk, Virginia, in April, 1861, was seized and sunk in the channel, by a body of men assuming to act under authority of the State of Virginia, but without any offense on the part of the master, or any charge against him, and that he attempted to obtain both civil and military protection, but without success.

Held, that this was not within the usual exception in the policy by which the insurers were warranted "free from loss or expense arising from capture, seizure, detention, or the consequences of any attempt thereat;" but was an act of lawless violence, by persons coming within the description in the policy of "pirates, rovers and thieves."

2. In such a case, evidence on the part of defendants, that at the same time a number of vessels were sunk in that channel by order of Governor Letcher, of Virginia, is inadmissible, because the obstruction of such channel without authority of the United States, would be criminal, and the seizure of plaintiffs' vessel for such a purpose is lawless.
3. Even if such fact were admissible, it is not of a nature which renders it competent for a witness who had no personal knowledge of it, to testify to it as a matter of public history. Such testimony is within the general rule excluding hearsay evidence.
4. *Held further*, that the so-called secession ordinance of the State of Virginia, offered in evidence by defendants, was inadmissible, because, 1.

Swinerton et al. v. The Columbian Insurance Company.

There was no proof connecting it with the seizure. 2. There was no proof that it had been adopted by vote of the people of Virginia, which, by its own terms, was required before it could take effect. 3. No such national sovereignty as Virginia is recognized by governments or known to the law. 4. The ordinance was unlawful and treasonable against the United States, and could confer no lawful authority.

(Before all the Justices.)

Heard, May 24, 1862; decided, June 14, 1862.

THIS action was brought by S. A. Swinnerton and Thomas W. Dawson, on a policy of marine insurance. It was tried on the 14th of March, 1862, before Mr. Justice MONCRIEF and a Jury.

It appeared from the testimony produced by the plaintiffs on the trial, that in September, 1860, they were the owners each of one-sixteenth part of the schooner "Lawrence Waterbury." On the 7th of that month, S. C. Nelson effected an insurance with the defendants, of the said two-sixteenth parts of the vessel "on account of whom it may concern," for one year from that date; the policy containing the usual exception in favor of the insurers, that they were warranted "free from loss or expense arising from capture, seizure, detention, or the consequences of any attempt thereat."

In February 1861, while the vessel was on a voyage from St. Marks, Florida, to New York, and while the policy was still in full force, she was disabled in a storm at sea, and forced to put into Hampton Roads, where she was stranded (it being thick weather) on the beach, and remained there until about the thirtieth of March, 1861, when the master and wreckers, with great difficulty, succeeded in getting her off and taking her into Norfolk, in Virginia, for repairs.

On April 21st, 1861, while the schooner was undergoing these repairs at Norfolk, sixty or eighty men seized her, broke open her cabins, filled her with stones, took her down about a mile below Norfolk, towards Fortress Monroe, and sunk her in the channel or entrance of the river. The captain of the schooner, (who was also part

Swinnerton et al. v. The Columbian Insurance Company.

owner and one of the plaintiffs—Swinnerton,) remonstrated with the men who were engaged in this act, stated to them that he was master, and resisted their proceedings by ordering them to desist and leave, but without effect. The man who was giving orders to the others to throw the stones aboard, and who, Swinnerton testified, appeared “to be the boss or head man,” paid no attention to the protest and remonstrances of the captain, but merely remarked, “that the State of Virginia was good for it;” and when asked by what authority he had possession of the schooner, replied, “that it was by authority of the State of Virginia.” The captain also applied to a lawyer for legal assistance, and to a military man to whom several persons referred him, but could get none. He also applied to see if he could get the vessel up, but could get no satisfaction. “It was all,” Swinnerton said, “confusion then in the place. * * * It was a perfect mad-house.” The persons engaged in this work, cut through the schooner’s decks, and put about one hundred tons of stones on board her. A steamer lay alongsidé her all the time while she was being filled, and, when filled, took her away to the place where she was sunk, as before stated. There was a great deal of cheering and hurraing when she went off. The captain testified further, that he had not violated any law or regulation of the port, and was not notified that he had, nor charged with having done so. The vessel was never recovered. Due notice of abandonment of the vessel to the defendants was served upon them in proper time by the plaintiffs; and due proof of interest in the vessel, and of her loss, was in like manner made and delivered by the plaintiffs to the defendants in New York, on May 7th, 1861, the captain of the vessel not being able to leave Norfolk until the 27th of April, 1861.

The whole amount of the plaintiffs’ claim, with interest, was \$1,065 $\frac{1}{2}$.

The defendants’ counsel moved for a dismissal of the complaint, on the ground that the testimony in connection

Swinnerton et al. v. The Columbian Insurance Company.

with the history of the times, showed that the seizure and detention of the vessel was by direction or permission of the authorities of the State of Virginia, or of the City of Norfolk, in which case, they alleged, the loss would fall within the exception of the policy, or else it showed that the plaintiffs did not make a proper resistance to the seizure, or a sufficient effort to procure the protection of the authorities.

The Court denied the motion and the defendants excepted.

Andrew C. Morris was then called as a witness, by the defendants. He testified, that about the time of the seizure of the plaintiffs' vessel, several vessels were sunk in Norfolk harbor by order of Governor Letcher, of Virginia. The witness, on cross-examination, stated that he was not then in Virginia, and had no personal knowledge of the fact testified to by him; but that he stated it as a matter of public history and general notoriety. The Court thereupon, on the plaintiffs' motion, struck out this testimony, to which defendants' counsel excepted.

The defendants' counsel then offered to read what he called "the Secession Ordinance passed by the State of Virginia" on the 17th day of April, 1861.

The plaintiffs' objected to the reading of the ordinance as matter of evidence, on the ground that it was immaterial and irrelevant. The Court sustained the objection, but permitted it to be read to fix its date.

It was read accordingly. It purported to be a declaration and ordinance by "the people of Virginia," that the union between the State of Virginia and the other States, under the Constitution of the United States of America, was thereby dissolved, and that the State of Virginia was in the full possession of all the rights of sovereignty which belong and appertain to a free and independent State, and that the Constitution of the United States of America was no longer binding on any of the citizens of Virginia; and the same ordinance further declared, that it should take effect and be an act as of its date when ratified by a majority of the votes of the people of Virginia, cast at a poll, to be

Swinerton *et al.* v. The Columbian Insurance Company.

taken thereon on the 4th Thursday of May, 1861, in pursuance of a schedule to be thereafter enacted.

The protest of the master of the vessel (Swinerton) made at New York, on April 30, 1862, detailing the circumstances of the loss of the vessel, was read in evidence by the defendants. The facts which it alleged or recited are substantially those above stated to have been established by the plaintiffs' testimony, and nothing more.

This was all the testimony the defendants' counsel introduced or offered. He then requested the Court to charge the Jury, that if the seizure and detention were by the authorities of the State of Virginia or the City of Norfolk, it was within the exception of the policy, warranting the insurers free from loss or expense in case of seizure or detention, and the plaintiffs were not entitled to recover.

The Court refused to do so, decided that there was no question for the Jury, and directed a verdict for the plaintiffs, to the amount of their claim as proved. The defendants' counsel excepted; and the Jury found a verdict for the plaintiffs, as directed, for \$1,065 $\frac{1}{10}$.

From the judgment entered upon this verdict, the defendants brought the present appeal.

A. C. Morris, for defendants, appellants, cited, as to the meaning of the word "seizure" and "detention," 2 Arn. on Ins., 812, and cases cited, *Green v. Young*, (2 Id. Raym., 840; 2 Salk., 444,) *Hagedorn v. Whitman*, (1 Stark., 157,) *Black v. Marine Ins. Co.*, (11 Johns., 292,) *Dalgleish v. Brooke*, (15 East, 294,) *Nesbitt v. Lushington*, (4 T. R., 783,) and argued, that the fact that the act was unlawful, with reference to the general government, had nothing to do with the matter, the exception in the policy not being against unlawful seizures, &c., but against all seizures, without qualification. (*Powell v. Hyde*, 34 Eng. L. & E., 44; 2 Arn. on Ins., 808.) The clause is sometimes restrained by the word "unlawful." (*McCall v. Marine Ins. Co.*, 8 Cranch, 59; *Olivera v. Un. Ins. Co.*, 3 Wheat., 183.)

Swinerton & al. v. The Columbian Insurance Company.

Daniel Lord, for plaintiffs, respondents.

I. The loss is within the risks insured against and covered by the terms of the policy.

1. It falls properly within the term "*pirates, rovers and thieves*." (3 Kent Com., 303; *Brown v. Smith*, 1 Dow, 349; *Bondrett v. Hentigg*, 1 Holt's N. P., 149; *Nesbitt v. Lushington*, 4 T. R., 783; 2 Arn. on Ins., 821; *Brown v. Smith*, 1 Dowl. Parl. C., 349; *Dixon v. Reid*, 5 B. & Ald., 597; 1 Phil. on Ins., 640, § 1106; 2 Pars. on Mar. Law, 236.)

2. If not within the perils specially enumerated, it is within the general term "all other perils, losses," &c. (2 Arn. on Ins., 846; 2 Pars. on Mar. Law, 236, 252; *Naylor v. Palmer*, 8 Exch., 739; *S. C.*, 10 Id., 382.)

II. The loss does not fall within the terms of the warranty against "capture, seizure or detention," for,

1. It was not a "capture." (2 Arn. on Ins., 811, § 303; see also *Wheat. on Cap.*, 52, § 10; 1 Phil. on Ins., 3 ed., 643, § 1108, &c.; *Emerigon*, [Meredith ed.,] 420; *Pars. on Merc. Law*, 450; *Marsh. on Ins.*, 495.)

2. It was not a "seizure." (1 Phil. on Ins., 643, § 1108; *Mellish v. Andrews*, 15 East, 13; *Carrington v. Merchants' Ins. Co.*, 8 Peters, 493; *Mumford v. Phenix Ins. Co.*, 7 Johns., 449; *Bradstreet v. Neptune Ins. Co.*, 3 Sumn., 601, 615; *Magoun v. New England M. Ins. Co.*, 1 Story, 165.)

3. Nor was it a "detention." (2 Pars. on Mar. Law, 247; 3 Kent Com., 303; 2 Arn. on Ins., 817.)

4. Nor was it an arrest or detainment by "people." (2 Arn. on Ins., 817; *Nesbitt v. Lushington*, 4 T. R., 783; *Marsh. on Ins.*, 506; and see Judge NELSON's charge, in the *Case of the crew of the "Savannah."*)

III. The exceptions taken by the defendants to the rulings of the Court were properly disallowed.

BY THE COURT—WHITE, J. There was no error in any decision or direction of the Justice, at the trial of the cause.

According to the general current of authority on the subject, a seizure, which is a mere act of lawless violence, is not within the exception in the policy upon which the

Swinnerton *et al.* v. The Columbian Insurance Company.

defendants rely for a defense. The seizure contemplated by that exception is a seizure by some lawful acknowledged government for some probable cause, sanctioned by the law of nations; *Carrington v. Merchants' Ins. Co.*, (8 Peters B., 516–518,) *Smith v. The Delaware Ins. Co.*, (3 Serg. & Rawle, 74,) *Faudel v. The Phoenix Ins. Co.*, (4 Id., 29,) *Johnston v. Ludlow*, (2 Johns. Cases, 481,) *Magoun v. N. E. M. Ins. Co.*, (1 Story Rep., 165;) and the proof offered by the defendants was insufficient to establish, in this case, any seizure of that character.

The statement of the witness, A. O. Morris, that at about the time of the seizure of the plaintiff's schooner, several vessels were sunk in Norfolk harbor by the order of Governor Letcher of Virginia, would not establish a seizure that would constitute a defense to the plaintiffs' claim, even if the statement had been made upon the personal knowledge of the witness. The office of Governor Letcher conferred upon him no authority to sink vessels, the only purpose of which could be to destroy or obstruct a harbor, the enjoyment of which, the Court will take judicial notice, belongs to the United States, and to the use of which, with free right of ingress and egress, every citizen of every one of the United States is entitled, under the National Constitution and laws. Such an act of destruction would be criminal, and the seizure of the plaintiffs' vessel for the purpose of accomplishing it, would be a mere lawless violence.

But, further, the testimony of Mr. Morris was not competent evidence. He testified that he had no personal knowledge of the fact that any vessels were seized or sunk by order of Governor Letcher. He said that he only stated the fact as a matter of public history and general notoriety. This was not admissible. There was no reason for resorting to mere public fame or history for proof of the fact alleged. Neither its nature, nor any special circumstances appearing in the case, rendered such evidence of its existence proper, or would justify its exception from the general rule, excluding hearsay testimony; and Mr. Morris'

Swinerton et al. v. The Columbian Insurance Company.

testimony was nothing more. It was incompetent evidence, therefore, and was properly excluded.

The proposal of the defendant to give the so-called Secession Ordinance of the State of Virginia in evidence, was equally inadmissible. The ordinance would have been no justification of Governor Letcher's alleged act, if it had been proved (as it was not) that he had done the act alleged :

First. Because there was no proof that the ordinance, even if it were a lawful act, had any connection whatever with the seizure and destruction of the plaintiff's vessel ;

Secondly. Because the ordinance, by its own terms, was to be of no effect unless it should be ratified by a majority vote of the people of Virginia ; and it was not shown, or proposed to be shown, that it was so ratified ;

Thirdly. Neither the United States, nor any other nation or government, has acknowledged or recognized any such national sovereignty as " Virginia," or " The People of Virginia," and there is none such known to the law of nations or of the United States, or of this State ;

And fourthly. Because the ordinance, if it were shown that the plaintiffs' vessel had been destroyed in pursuance or by virtue of it, was an unlawful, treasonable act against the sovereignty and Constitution of the United States ; and, being so, instead of giving validity to, or legalizing acts done in obedience to, or in execution of it, only rendered them more unlawful and criminal. The exclusion of it, therefore, as evidence at the trial by the Judge was correct.

There is nothing, then, in this case, either in the testimony admitted, or in that which was offered by the defendant and excluded, that could show the seizure and destruction of the plaintiffs' vessel to have been a lawful act of an acknowledged government, or public authority, and within the exception of the policy. It was the act of a mere tumultuous, riotous assemblage of unknown persons, coming within the description in the policy of " pirates, rovers, thieves," against whom it expressly assures the plaintiffs. (*Nesbitt v. Lushington*, 4 Term R., 783.)

The judgment must, therefore, be affirmed with costs.

MOSES TAYLOR *et al.*, Plaintiffs and Appellants, v. THE ATLANTIC MUTUAL INSURANCE COMPANY *et al.*, Defendants and Respondents.

1. Where a vessel becomes a wreck, and sinks in navigable waters, without fault of the owner, and so as to be immovable by ordinary means, if the owner or any transferee, instead of abandoning it, retains such possession and control as the thing is susceptible of, he is not liable for any injury occurring while he is in the exercise of due care and diligence to prevent it. So long as he is using all reasonable means to effect its removal, without being able to accomplish it, he is not liable for any damages resulting from the mere fact of its non-removal.
2. He is not under any legal obligation to attempt to remove the wreck; and if he choose he may abandon it, and from that time his liability will cease. (Per BOSWORTH, Ch. J.)
3. Negligence in the use of means to remove the wreck is not necessarily established by proof that the means first employed were inadequate. If they were such as the best skill and the largest experience selected, in good faith, as adapted to the end to be accomplished, negligence cannot be predicated of their failure. The owner is not responsible for failing to remove the wreck if, after having made proper arrangements for carrying on the work, those arrangements failed without any fault on his part.
4. It is not incompatible with the owner's duty, for him to adopt a plan for the removal, which embraces the design of saving as much as possible of the wreck and cargo.
5. Where a vessel, alongside of a public pier in the City of New York, was burned without any fault of her owner, and sunk to the bottom near the mouth of the slip or basin, thereby obstructing the slip and bulkhead so as to prevent other vessels from coming in, and the defendants, insurance companies, which had insured undivided interests in the vessel, and had accepted an abandonment made by such insured owner, after the loss, employed a man of acknowledged skill and ability in the business of wrecking, who diligently prosecuted his efforts to raise it, until his method failed, and he left the work, when the defendants employed another man of equal skill and ability, who adopted another plan, and continued diligently working until stopped by cold weather, nearly a year after the vessel sunk, and in the following spring resumed the work, but was soon stopped when very near completing it, by the city authorities, who took exclusive possession and control, and who finally removed the wreck.

Held, 1st. That the defendants were not liable to the owners of the pier, for its use in the prosecution of their work, or for damages in obstructing the basin meanwhile, since these facts did not show any negligence on their part.

2d. That the defendants were not liable for any delays occurring after the city authorities took possession and control.

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

3d. That the defendants were not liable for any injuries to the pier, done in the course of the work prosecuted by the contractors employed by them.

4th. *Held further*, that the above facts appearing from all the plaintiffs' evidence at the trial, the plaintiffs were not entitled to have the cause submitted to the Jury; but it was proper to instruct the Jury to render a verdict for the defendants. (BARBOUR and MONELL, J. J., dissented.)

6. In such a case, if the demand made on behalf of the plaintiffs to have the cause submitted to the Jury, does not suggest what question, if any, they should be called to pass on, it is too broad to sustain an exception on a refusal of the demand. (Per MONCRIEF, J.)

(Before all the Justices.)

Heard, March 22; decided, June 21, 1862.

THIS action was brought by Moses Taylor, Edward Minturn and Joseph B. Collins, Trustees and Executors of the Estate of Benjamin G. Minturn, deceased, George W. Coster and Henry A. Coster, Executor and Trustee of the Estate of John G. Coster, deceased, and Catharine Mitchell, against The Atlantic Mutual Insurance Company, The New York Mutual Insurance Company, The Astor Mutual Marine Insurance Company, The Reliance Mutual Marine Insurance Company, The Sun Mutual Insurance Company, The Union Mutual Insurance Company, The Mercantile Mutual Insurance Company, Loftis Wood, Richard Eccles, William H. Webb.

A former decision on a demurrer to the complaint is reported in 2 Bosw., 106; after which plaintiffs amended their complaint. The nature of the pleadings, and the substance of the evidence given at the trial, appear in the opinions of the Court.

At the trial, on May 17th, 1861, before Mr. Justice Hoffman and a Jury, upon the close of the plaintiffs' testimony, the defendant offered no evidence, but moved the Court to direct a verdict for the defendants, which the Court did, and plaintiffs excepted. The plaintiffs demanded to go to the Jury, which request being denied, the plaintiffs excepted.

After plaintiffs had moved for a new trial, and the motion had been denied, and after defendants had entered judgment on the verdict, plaintiffs appealed to the General Term.

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

Charles A. Tracy, for plaintiffs, (appellants.)

I. The master of the vessel having brought her to unload, paying wharfage to plaintiffs, the owners were under an implied contract to pay for the use and occupation, and for any obstruction, so long as the vessel remained there. Their continuing to occupy the slip gave plaintiffs an action. (3 Blackst., 184; *Mayor of N. Y. v. Hill*, 13 How. Pr., 280; *Jordan & S. Plank Road Co. v. Morley*, 23 N. Y. R., 552; *Decker v. Jaques*, 1 E. D. Smith, 80.)

II. The defendants regarded the vessel and cargo as valuable property, and were engaged in unloading her during the time of all the work. (Flanders' Mar. L., 321, § 387, pp. 322, 323, § 389, 390; 2 Pars. Mar. L., 615; Abb. on Ship., 555; *Schooner Boston*, 1 Sum., 328; *The Bee*, Ware, 332; *The Barefoot*, 1 Eng. L. and E., 661, 664.) The right to abandon her as a wreck does not give a right to continue to use the pier free of charge.

The accident cannot shield the defendants. (See *Linsley v. Bushnell*, 15 Conn. R., 225; *United Ins. Co. v. Scott*, 1 Johns., 106; *Holmes v. The United Ins. Co.*, 2 Johns. Cases, 329; *Wiswall v. Brinson*, 10 Ired., N. C. R., 554; *Scott v. Shepherd*, 2 Bl., 892; 3 Bl. Com., 219, 220, 236; Broom's Legal Max., pp. 92, 93; *Farmers' Turnpike Co. v. Coventry*, 10 Johns., 389; *Smith v. Elder*, 3 Id., 105; *Clark v. Foot*, 8 Id., 421; *Panton v. Holland*, 17 Id., 92; *Lansing v. Smith*, 4 Wend., 25; and cases cited by Hopkins, *arguendo*, 16; Acts of 1813, §§ 212, 218, 233, 235, in Davies' City Laws, 541, 559.)

III. The evidence shows that defendants were negligent. (See Phear on Rights of Water, 54, [100 Law L., O. S., 84 Id., N. S.]; Woolrych Law of Waters, 202, 203, [78 L. L., O. S., 62 Id., N. S.]; *Althorf v. Wolfe*, 22 N. Y. R., 355.)

Defendants having entered upon the business, thereby being in the way of others doing it, were bound to diligence, even though they acted as an unremunerated volunteer. (*Balfe v. West*, 22 Eng. L. and Eq. R., 506; Smith's Mer. L., 107; 1 Pars. on Cont., [1st ed.,] 581-586.)

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

IV. It was error not to let the case go to the Jury. The question of negligence should have been left to them.

Daniel Lord, for defendants, (respondents.)

I. The accident, without fault of the owner, put an end to wharfage. The decision in 2 Bosw., 106, disposes of wharfage. A sunken vessel creates no liability on her owner for wharfage.

II. As to removal, the wharf keeper should do it. A wrecker (a salvor) took possession and took the office of saving. The defendants never had the possession. The salvor had the possession.

III. If the wreckers were defendants' agents, they were only bound to reasonable diligence, and that was proved.

BOSWORTH, Ch. J. The complaint in this action was dismissed at the trial; and judgment having been perfected, the plaintiff appealed to the General Term.

The ship *Joseph Walker*, of about 1,300 tons burthen, while lying on the west side of pier No. 29, East river, at the port of New York, taking in cargo, took fire, on the 26th of December, 1853, and sunk to the bottom. She had on board some 300 or 400 barrels of resin, some 300 bales of cotton, and some 20,000 bushels of wheat, all of which was submerged. The defendant was insurer of $\frac{1}{3}$ parts of the ship, other insurance companies, (who are also defendants,) were insurers of the interests of other owners; only $\frac{2}{3}$ parts being uninsured, and the owners of those parts are also defendants. The sunken wreck was not removed from the slip, until the 25th or 26th of October, 1855. The insured owners of the vessel abandoned her, after she was burned and sunk, as a total loss, and the insurance companies accepted the abandonment.

The plaintiffs, who are entitled to the wharfage of the bulkhead on the west side of this pier, and of the west half of the pier, bring this action to recover by way of damages for the obstruction of the slip, the amount of wharfage they claim to have lost thereby, and also

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

damages for using the pier, and for further obstructing the slip, in efforts to raise and remove the wreck of the vessel, and save whatever could be saved from the wreck. The action was tried on the issues formed by the answer of the Atlantic Mutual Insurance Company; the other defendants having stipulated that the action, as to them, should abide the event of that trial.

The two practical questions presented by this appeal are, (*first*,) what duty or obligation was imposed on the defendant by accepting this abandonment, and, (*second*,) whether it has so failed to perform that duty or discharge that obligation, as to have become liable to pay damages to the plaintiff.

With reference to the first question, it may be observed, preliminarily, that the ship took fire and sunk, without any agency or fault of the defendant. She sunk to the bottom, in about 30 feet of water, at medium tide. From the time she sunk until she was removed, the plaintiffs expressed no desire to undertake her removal, nor made any objection to the means employed or time occupied in the effort; nor suggested that these means were injudicious or inadequate, nor that the efforts were dilatory or censurably inefficient. The vessel was sunk in an arm of the sea, and became fixed to the bottom, and ceased to be movable as a ship or vessel, by any ordinary means in the course of business or navigation. The results of the efforts made to remove the wreck demonstrates, that it cost more to remove her, than all that was saved, of both vessel and cargo, was worth.

This Court held, when this cause was before it on a demurrer to the original complaint, that the plaintiffs could not recover, without showing that the defendants, by due care and attention, could have removed the wreck, or, at least, have shifted its position so as to prevent its being a cause of injury, and that they were in default for not having done so. (2 Bosw., 106.) The cases relied upon, as supporting this doctrine, are *Brown v. Mallett*, (5 M., G. & Scott, 613; S. C., 12 Jur., 204.) *Hancock v.*

Taylor *et al.* v. The Atlantic Mutual Insurance Company *et al.*

The York, New Castle & Berwick R. R. Co., (10 Com. Bench, 348,) and *White v. Crisp*, (26 L. & Eq. R., 532.) In the first of these cases, it was held, that "the duty of the defendant, if it exist at all, is of a public nature; and the plaintiff, in order to succeed, must show a breach of public duty, as well as special injury to himself," (p. 620.) In the second of these cases, MAULE, J., said, that "the circumstance of the anchor [the vessel] being the defendant's property, will not of itself render them liable. To have this effect, it must amount to a public nuisance, and a private injury, *by them*. The declaration * * * shows about as good a cause of action, as if it had stated that somebody beat the plaintiff with the defendants' stick."

ORESWELL, J., said: "No *negligence* or *want of care* is imputed to the defendants, either in placing the anchor where it was originally placed, or in allowing it to be removed."

In *White v. Crisp*, (*supra*), which, like the other two cases, arose on demurrer, the Court, in commenting upon and construing a particular allegation of the complaint, said: "Now, we understand by this, that the defendants "had it in *their power*, by *due care and exertion*, to have "altogether removed this vessel, or to have shifted, at "least, its position, and so might *reasonably* have been "able to prevent the injury. If these words do not mean "this, we think there was no liability on the part of the "defendants." * *

The fourth plea was, that the defendants "had used all "reasonable means for removing the wreck, but were "unable before the time when, &c., to do so; and that, by "reason thereof, before and at the time when, &c., they "had wholly abandoned and ceased to have any possession of it." The Court held this plea good, and said it was clear the original owner or the transferee of the wreck may abandon it, and so put an end to his liability.

These cases establish the doctrine, that where a vessel becomes a wreck and sinks in navigable waters, the owner

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

or any transferee may abandon her, and from that time his liability will cease; that he is not under any legal obligation to attempt to remove her. But if, instead of doing that, he retains such possession and control as the thing is susceptible of, he is not liable for any injury occurring while in the exercise of due care and diligence to prevent it; that, so long as he is using all reasonable means to effect a removal, without being able to accomplish it, he is not liable for any damages resulting from the mere fact of its non-removal; and that, although it may be a public nuisance, he cannot, on such a state of facts, be indicted for causing or continuing it.

It would be indeed strange, if a party who was under no legal obligation to remove, or to attempt to remove a wreck, should, because he attempted to remove it, and while using all reasonable means and diligence to accomplish the result, become liable because he had not removed it.

On no principle can a right of action accrue, in such a case, for not having removed the wreck, until at least a sufficient time has elapsed to effect the removal by the use of reasonable means and diligence; and all liability for merely not removing will terminate, when the owner abandons the possession of the wreck and all control of it.

This view of the defendant's legal duty, makes his liability, if one exist, arise out of his negligence, to use reasonable means and diligence. While using them, and he continues unable to remove the wreck, he is under no liability to pay damages to any one for not having removed it. The plaintiffs' right, as against the defendant, is commensurate with the duty which the latter owes to the former. They can maintain no claim against the defendant, except as founded on a duty it owes to him, and a failure to perform that duty.

Negligence in the use of means to remove the wreck, is not necessarily established by proof that the means first employed were inadequate. If they were such as the best skill and the largest experience selected, in good faith, as

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

adapted to the end to be accomplished, negligence cannot be predicated of their failure.

The most fully considered and best matured plans sometimes prove defective and fail. The best judgments at times form erroneous conclusions, and will continue to do so, until to err ceases to be human. These misjudgments consist with the utmost caution, care and diligence.

The duty and grounds of the defendant's liability, if any liability exist, being such as have been stated, we reach the question, whether there is any evidence which would justify a Jury in finding, that the defendant failed to remove the wreck, by reason of negligence in the selection or use of the means employed for that purpose.

No witnesses were examined on behalf of the defendant. We have, therefore, only to consider evidence given on behalf of the plaintiffs.

Thomas Bell made the first efforts that were made to remove the wreck. He was to have 75 per cent of the net proceeds of all he should raise; and he took entire possession and control of the wreck, in order to raise and remove her. It was testified that "he had the best reputation, as a man skillful in this sort of business, of any man in the United States; he was esteemed the best wrecker in the United States, so far as the witness was acquainted with his reputation. He used the same means that had been successfully employed to raise the "Great Republic," a ship of some 4,500 tons, which was sunk the same night as the Joseph Walker, and under similar circumstances.

No one except Mr. Mason suggests an opinion or intimation that Mr. Bell had not the skill imputed to him, or that the opinion was entertained, before his efforts proved a failure, that the means employed were not wisely selected, or were inadequate, or were not vigorously employed. John W. Mason, one of plaintiffs' witnesses, says he thought, at the time, and told Mr. Bell, that he thought Mr. Bell "got along very slowly" — "That Bell said he was using all the diligence he could, and was getting his

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

arrangements completed for going ahead." Mr. Mason did not pretend to any experience in the wrecking business, and said he supposed he was not as good a judge in the matter as Mr. Bell, and that he considered it required a skillful man in such business, to remove her.

Junius S. Lewis, another witness on behalf of the plaintiff, testified that he had been a wrecker some eight or ten years, and had raised wrecks from various depths, one being operated upon at a depth of eighty feet below the surface. That he became interested with Bell, in the raising of this wreck, in June, 1854. He details what was done while he was concerned in the operations. In answer to the question whether, "during the term of your working at that wreck, from your commencement with it, under Capt. Bell, and in connection with him, until the work was arrested, under Condon, was it prosecuted with all the diligence the work admitted of?" He said, "It was, in my judgment. I never used more diligence, and I never knew Mr. Bell more devoted; every man that could be used successfully, or to any value, was brought to the work," &c., &c. Also, that the suspension of the work from in December, 1854, into March, 1855, was required by the prudential considerations which he stated.

No one expresses an opinion contrary to that of Mr. Lewis; and Mr. Lewis, on examining Bell's plan, thought it judicious, and approved of it. When he suspended work in December, 1854, he thought the vessel was in a condition to be removed in a couple of weeks, when the work could be resumed, in the following March.

Somewhere from the first to the middle of March, 1855, Mr. Lewis resumed operations, and was soon arrested in his labors by the city authorities, who then took exclusive possession and control, and thence continued it, until the wreck was removed in October, 1855.

The only other witness who expressed an opinion, in regard to the means used by Bell & Lewis to remove the wreck, is Joseph T. Martin, who testified to the opinion that it could have been removed in January, 1854, by

using India rubber camels inflated with gas. But neither before nor since had he known of a vessel of over 300 tons burden, being so raised. That process, after being tried a year and half, was given up.

I do not think a Jury would be justified in finding negligence in the selection or use of means, on such slight evidence as that of Messrs. Mason and Martin, against that of Messrs. Bell & Lewis; or that the evidence, as a whole, justified the submission of any such question to the Jury. It should not be submitted, where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. (*Cotton v. Wood*, 8 Com. Bench, N. S., 568.) But the case is not even as strong as that, on the part of the plaintiff.

If this view is correct, then there is no liability resulting from the mere omission to remove the wreck, prior to the time Mr. Lewis was ejected from it.

From that time, neither the defendant nor any one employed by it or with its consent, had any possession or control of the wreck. They all abandoned it, or what is practically the same thing, suffered the city authorities and the persons employed by them, to retain exclusive possession and control.

Mayor Wood's contract with Walter B. Jones was concluded April 28, 1855, by which Jones was to be paid \$13,000 for raising the wreck, and was to have the benefit of any lien or liens on the vessel and cargo.

A reference to the opinions expressed by the witnesses who made efforts to remove, or applied for contracts to remove the wreck, shows that they severally erred in their conclusions as to what they could accomplish; and shows the importance, in disposing of the evidence bearing on the question of negligence, of remembering the wide difference there is between error in judgment and negligence. The event may demonstrate the existence of the power, and yet not tend to prove the latter.

In the proposition of Martin, dated January 6, 1854, he stated his expectation of being able to raise the wreck in

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

about two weeks, but offered to contract to remove her, "in all of this" (that) "month." He testified that his company could have taken her out "in the month of January."

Inasmuch as his company never before or since raised a vessel of over 300 tons burden, and abandoned their process about a year and a half after that, and inasmuch as all the efforts made did not result in her removal until in October, 1855, it cannot be said to be an act of negligence that the contract was not given to that company. And there is nothing to justify the conclusion, that if it had been given to that company, that the wreck would ever have been removed by the means it proposed to employ.

Mr. Bell does not state in what time he thought he could remove her. But it is evident he expected to accomplish it as soon as he had placed the canvas in position, and was able to use his pumps.

Mr. Lewis states the opinion, that, by using his plan in the outset, he could have removed her in about two months. But that he would not have commenced work under it before March, as it could not be safely prosecuted earlier. At the outside, according to his theory, he would have removed her in five months from Jan. 1, 1854.

His plan was adopted in August, 1854. He commenced immediately, and, the last of September, was in readiness for efficient operations, and prosecuted them until about the middle of December, 1854, when the weather became so frosty that he deemed it unsafe to expose his chains to the action of such weather, and suspended operations, supposing that in March, on the return of suitable weather, they could be concluded in about two weeks. What the event would have further demonstrated in regard to his plans and anticipations, had he been let alone, is left to conjecture. He was expelled from the wreck in March, 1855, by order of the Mayor of the city. In addition to what he testifies to, as to actual diligence and good faith in his efforts, it was his interest to permit no unnecessary delay. Neither he nor Bell was to be paid anything if they did not succeed; and they incurred the expense of

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

keeping vessels over the wreck, and Mr. Wintress, in charge of them during the winter. It was for their interest, if, in the fair exercise of their judgment, enlightened by their long experience in the business, and also in the matter of this wreck, they believed it practicable to continue operations after the middle of December, 1854, to have done so.

On the 26th of April, 1855, the contract between Mayor Wood and Walter B. Jones, for the removal of the wreck, was concluded. Jones agreed to remove it "within a reasonable time," and states in his contract, that he thinks "the job may be accomplished in sixty days." This is as long a period as Lewis thought he required, if his plan had been originally adopted.

On the 30th of April, 1855, C. F. Barnes contracted with Walter R. Ives, to remove her in 90 days from that date. On the 9th of May, 1855, Barnes and Daniel Dodge contracted with Jones to remove her in 90 days from that date.

On the 15th of October, 1855, over five months from that time, Barnes was occupied in taking out cargo, and, in turn, was expelled from the wreck, and excluded by force, from continuing his labors, although he then had it in a position which would have secured its removal in a few days.

Hence, the testimony shows, without contradiction, that from early in January, 1854, until October, 1855, (excepting the time that Lewis suspended operations, from the middle of December, 1854, to March, 1855,) different persons, conversant with business of this kind, and interested to effect the removal, and to effect it with the least practicable delay, were constantly and vigorously occupied, at a great expense to themselves, to accomplish that object.

There is no ground, upon the evidence, on which the conclusion can be justified, that it was negligence to attempt the removal by Bell's plan; or, after that was demonstrated to be insufficient, to pursue the plan of Lewis; or that there was a want of reasonable diligence in pursuing either plan, while the work of removal was prosecuted under it.

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

From the time of Lewis' expulsion, and the assumption of possession and control by the Mayor of the city and those who acted under the contracts made with him, there was an actual, an entire abandonment by the defendant of all possession and control, whether real or apparent. The defendant's liability then ceased, and for any unreasonable delay thereafter, in removing the wreck, the defendant is not liable.

If there be any liability for that, it must be pursued against those who had the possession and control, and used the means, which are alleged to have been unreasonably inefficient or dilatory.

I think, therefore, that on the evidence there can be no claim against the defendant for damages for not having removed the wreck. And, if this be so, there can be none for the expenses of dredging, caused by the accumulation of *debris*, deposited by the action of the tides in and about the wreck. Nor is there any for injury to the pier itself.

The plaintiffs' only witness who spoke to that point, states, that "there was no special damage done to the pier—not to amount to anything—probably fifty dollars would have replaced all that." There is no specification of any item of damage done to the pier itself, by either Bell or Lewis; nor of their having made any use of it, which obstructed the passing or repassing of carts, or which was in itself wrongful.

And I cannot think that by force of the contracts with Bell, or between Bell and Lewis, it can be held, that whatever use they made of the pier, was a like use and occupation by the defendant. The latter had no control over their operations and was not an actor in them.

The possession and control of the ship were surrendered to Bell. He undertook the removal, and to do it as best he could. No one had any direction to give to him, or undertook to interfere with him in carrying out his plan.

I think the cause was correctly disposed of at the trial, and that the judgment should be affirmed.

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

ROBERTSON, J. • Two causes of action are set out in the complaint in this case. The first for the occupation of the plaintiffs' slip or dock by the vessel in question, (Joseph Walker,) while afloat and after she was sunk, and by other vessels employed to refit, float or remove her; this was a *quasi* contract. The other, for the loss of the wharfage of such slip by the use of various machinery and vessels closing it up, and the sinking of them and the vessel in question in such slip; which was a species of tort.

The defendants, in their answer, besides putting in issue the right of the plaintiffs to the wharfage of the slip in question, and the fact of defendants having kept any vessels or machinery fast to the pier, or that the vessel in question remained fast to the pier, deny two important allegations in the complaint:

I. Any ownership of the vessel after she was burned and sunk, and all acts of ownership thereof by them.

II. The possibility of removing such vessel, within a reasonable period, without unreasonable expense, even by proper means and with due diligence.

The plaintiffs' claim rests entirely upon the actual ownership of the wreck by the defendants, or their exercise of acts of ownership over it, the duties thereby devolving on them, and their mode of discharging such duty.

The question of liability of the owners of a submerged vessel, for injury to other vessels by it, is discussed and passed upon in *White v. Crisp*, (10 Exch., 312; *S. C.*, 23 Law J. R., [N. S.,] Ex., 317, and 26 Eng. L. and Eq. R., 532,) and *Brown v. Mallett*, (5 M., Gr. & Scott, 613,) but nothing is said as to any supposed liabilities by implied contracts with third persons. That the Court in those cases did not intend to apply the doctrine laid down by them to contracts is evident from the qualification in the last case of the doctrine laid down in the first, by requiring the sunken vessel, or obstruction, to be a public nuisance in order to make the owner responsible. The first case admits the liability to cease when the possession of the sunken vessel is abandoned; and the duty which is therein

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

charged on the owner is, merely, that if he can, by due care and exertion, shift its position so as to prevent injury by collision, he is bound to do so, although it is out of the way of ordinary navigation.

The reason for the distinction in such case, as to the liability for torts, or on contracts, is obvious. Where a person has power to remove an obstruction from the highway, whether of land or water, when it is valuable to him as a piece of property, and he exercises acts of ownership over it, it is a permissive nuisance to omit to do so, and he is responsible for injury caused by it to others. But a vessel sunk in a slip, by an unavoidable cause, is a common calamity to both the owners of the slip and the vessel, for which neither is responsible. The waters of the slip are still part of the aquatic highway, on or over which every one has a right to go. The defendants would have had no right to shift the nuisance to another slip, or the channel way, nor were they under any obligations to destroy all the property in it by blowing it up and scattering it, merely because it was an obstruction to the plaintiffs' profits. They were bound, undoubtedly, not to leave it an unreasonable time there, and were bound to use due diligence in removing the property, or abandoning the ownership of the wreck. This can be the only reasonable, practical and just rule, where two persons are overtaken by a common calamity, and one seeks to aggravate or prolong the injury to the other for his own benefit.

The mere occupation of the plaintiffs' slip by the vessel in question, therefore, did not give them a right of action until it was unreasonably prolonged, whether it were two or fifty years. It is true one of the witnesses, (Lewis,) says he lifted the vessel clear, and could have carried her anywhere; but he does not say he could have carried her to a place of safety; and the defendants had as much right to endeavor to save the cargo in that slip as anywhere else, provided they used due diligence. After such lifting, the labors of the defendants were continued in endeavoring to remove the cargo and lighten the vessel;

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

and it was undoubtedly owing to such labors that the vessel afterwards was so lightened as to be carried off by the employees of a public functionary, as is shown to have been done. It was clearly the duty of the defendants to have used due diligence and proper means for removing the wreck in question in a reasonable time; and this obligation includes not only the employment of skillful men as instruments, but the adoption by them of proper means, and the prosecution of the work with due diligence; but it does not require the utmost diligence or the use of the most rare and successful means ever known by any human being or even of those of which the knowledge was limited to a few. The failure of instruments or insufficiency of materials employed, and even delays in carrying on the work, would not amount to a dereliction of duty, if reasonable caution and judgment were exercised in the selection of such instruments or materials, and no more time was lost than was reasonably necessary to prepare for the work, provide instruments and materials, procure mechanics or scientific persons or workmen to carry on the work, and even to devise new plans in case those previously tried failed. The defendants would, in fine, not be responsible if, after having made proper arrangements for carrying on the work, those arrangements failed without any fault on their part; they are not to be held to as strict an accountability as if they had taken the risk of all accidents and undertaken to use the utmost diligence, by a contract with the plaintiffs.

In regard to the testimony respecting the degree of care and judgment practiced in the use of means in this case, it would appear that an experienced man was employed within a short time after the accident, who worked diligently until he left; that when he left, another of equal skill was employed in his place, who continued working diligently until stopped by cold weather, and in the spring operations were resumed and continued actively, until stopped as before mentioned. The delay or defeat of the enterprise by the bursting of the canvas first employed to

envelope the wreck, was not imputable to the defendants, as it had been originally properly prepared for the purpose, was made of suitable materials, and yielded to some defect not perceptible to outward observation, and the cause of which was only a matter of conjecture.

Assuming the plan of Mr. Lewis to have deserved the praise bestowed by him upon it, and to have been actually superior to that of Captain Bell, yet in the opinion of the latter, who was at least equally experienced, it was not so. It was not, therefore, so clearly the best plan as to have required the defendants to adopt it, even although a Jury might have found it to be the best, if that question had been submitted to them, because there is no evidence that it was generally recognized to be the best, so that a prudent man would have most probably adopted it in his own case. Estimates of witnesses, as to superiority of plans or the time necessary to raise this vessel, based upon a continuously favorable use of means, without interruption by accidents or neglect of contractors, are wholly inapplicable and unavailable against evidence of actual failure after employing the means and judgment, and using the degree of diligence, required and permitted by law in such case. If no mode had been attempted, such evidence might have been available in determining from what time damages should begin to be estimated, but for that purpose only. Captain Bell agreed to do his work "with all possible despatch," and was a competent person; if he failed, the only obligation on the defendants was to renew their efforts, as long as they claimed property in, and exercised the rights of owners over the wreck.

Messrs. Martin and Mason are the only witnesses who found fault with the means employed; the first opposed to them a plan of his own, which he had never seen tried on a vessel of anything like the size of the Joseph Walker, and the second admitted he had no experience in wrecking business, and did not know as much as the operator, whose slowness he criticized. Every one employed on the vessel worked diligently, on the plan adopted by him, and there

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

was no evidence, except of the parties so employed, that any one plan used was better than another. Some of them, with diligent working, took more time than their own estimates, although stimulated by the expectation of a large compensation if successful; thus showing the unreliability of such evidence. The last contractor was expelled by force, when he was within two days of reaping the fruits of his labors, as testified to by him, and the obstruction was removed in a short time afterwards. The utmost, therefore, the plaintiffs could have claimed, would be damages for the delay, not compensation for all the time the vessel was in the slip; but even that claim is unsupported by the testimony. There is evidence of such long, continuous, expensive, judicious, professional, skillful exertions to remove the obstruction, as to raise a strong presumption that everything was done which could reasonably have been demanded, and there is not sufficient evidence to warrant an inference of negligence in the face of the former evidence.

The case was, therefore, properly taken from the consideration of the Jury, and the judgment should be affirmed.

MONCRIEF, J. For the purpose of determining this appeal, it must be assumed to be the settled law of this case, "that when a vessel alongside of a public pier in the City of New York, is, accidentally, and without fault of her owner, burned, and sinks to the bottom, near the mouth of the slip or basin, thereby so obstructing the slip and bulkhead as to prevent other vessels coming in; those entitled to the slippage or wharfage, cannot recover for the loss thereof, caused by such obstruction, from the owner of such vessel, without showing that such owner, by due care and attention, could have removed the wreck, or at least have shifted its position so as to prevent its being a cause of injury, and that he is in default for not having done so. That when an insurance company, which has insured an undivided interest in such vessel and has

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

accepted an abandonment made by such insured owner, after the vessel was so burned and sunk, is not liable for loss of slippage or wharfage, caused by such obstruction, it not being alleged that, by due care and attention, it could have been removed. Such piers and bulkheads are open to the common use of the public, for any purposes connected with the loading, unloading, or repairing of vessels, and securing their cargoes, whether in vessels afloat or sunk, not prohibited by statute or the lawful ordinances of the common council. And such a use, when it neither incumbers the bulkhead or pier, so as to incommode the loading or unloading of vessels, or the passing or repassing of carts, nor in any way injures the structure itself, gives no right of action to the party entitled to slippage and wharfage. Hence, a use of the slip in attempting to raise the vessel and recover the property in it, especially as such attempt was made at the request of the plaintiffs, creates no liability to make compensation for such use, where there is no evidence showing such use to be wrongful or an invasion of the plaintiffs' rights, or a violation of any duty which the defendants owed to them." This was determined at a General Term of this Court, upon the appeal sustaining the demurrer to the original complaint in this action. (2 Bosw., 106.)

The complaint as amended did allege that the wreck, "the said ship, Joseph Walker, could have been removed with reasonable care, skill and diligence, in a short space of time, to wit, in the space of sixty days from the time when so sunk." That the defendants, having control and possession of said ship, have conducted themselves so negligently, unskillfully and carelessly, in and about their attempts at the removal of said ship, which they undertook to do, and as was their duty to do, and in and about the bringing into said slip, and sinking or suffering to be sunk and left there of the said other vessels or hulks, and in various other acts of negligence, unskillfulness and carelessness in respect thereto, that the plaintiffs have suffered great and lasting injury. That by means of all

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

which premises, and by said several acts of negligence, unskillfulness and by said other obstructions, brought into said slip by the defendants, and left there, and by injury to the said wharf and pier as aforesaid, and by the said piles driven and left remaining in said slip as aforesaid, and by said obstructions to the passing and repassing of carts upon and over said pier and wharf as aforesaid, and by preventing the entering and loading or unloading of vessels into and alongside said slip, pier and wharf, and by their unnecessary use and occupation of said premises as aforesaid, "the pier, wharf and slip or basin has been greatly interfered with, and the plaintiffs greatly damaged."

The appellants claim that the action "is substantially "for wharfage on the ship Joseph Walker, or for the use "and occupation of the plaintiffs' premises for not removing her, and obstructing the plaintiffs' slip and wharf, "and interfering with their franchise and revenue."

The only question undisposed of, if any, arises under the amended complaint, alleging that the defendants having undertaken to remove or shift the wreck, have not exercised due care and diligence in not removing the same within the space of sixty days, as with reasonable care, skill and diligence might have been done.

There was no sufficient evidence upon which this could properly be inferred by the Jury in favor of the plaintiffs; the direction to find for the defendants was therefore correct. (18 N. Y. R., 425.)

It was not suggested in the demand made on behalf of the plaintiffs to go to the Jury, what question if any they should be called upon to pass on; this demand was therefore too broad and comprehensive to predicate an exception upon, on a refusal being made. The request to submit questions of fact to a Jury, in analogy to a request to charge the Jury, must be specific, not general. (1 Kern., 61; 2 id., 313; 1 Seld., 422; 3 Id., 266; 18 N. Y. R., 558, 565, 566.) To require the submission to a Jury, it is not enough to say that there was some evidence to go to a Jury; there must be evidence upon which they might

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

reasonably and properly conclude that there was negligence on the part of the defendants. (3 Com. Bench, N. S., 146; 8 id., 570, 571.) The evidence introduced, intending to show want of due care, skill and diligence, was all introduced by the plaintiffs; the defendants offered no testimony upon that issue; it must be assumed, therefore, that there is no conflict of testimony to be examined or explained; there could be no disputed question of fact to pass upon; the contradictions, if any, were caused by the witnesses called and examined on behalf of the plaintiffs. There was, therefore, no disputed fact, and it was the duty of the Court to pass upon the question at issue, and determine it in favor of some party; it was a question of law. (2 Hill, 588; 3 Wend., 75.)

The direction in favor of the defendants is abundantly supported by the evidence; it would have been error to refuse it; this Court would be compelled to set aside a verdict in favor of the plaintiffs; the proof is overwhelming as to the skill, care and diligence exercised to remove the obstructions.

Again, the direction to find a verdict for the defendants, could have been put upon the ground, that the defendants were not responsible to the plaintiffs, even if there had been a want of due care, skill, &c.; the contract with Mr. Bell, authorizing him to take possession of the sunken property, with the view to its removal with all reasonable despatch, was made by the owners of the vessel and cargo, Samuel Thompson and nephew, and before the abandonment to the defendants; the latter could exercise no control or direction over Mr. Bell or his servants; he was not bound to obey or receive the orders of the defendants; while in the performance of this work he was in the exercise of an independent business; the relation of master and servant not existing between the defendants and him who alone could or did cause the injury complained of, the plaintiffs had no cause of action against the defendants. (24 Howard's U. S. R., 110, 124; 4 Bosw., 140.)

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

The judgment and the order denying the motion for a nonsuit should be affirmed.

WHITE, J. I had some hesitation in concurring in the affirmance of the judgment in this action; not because I was disposed to question the legal principles so well stated and reasoned in the opinions already delivered, in favor of affirming the judgment, but because I doubted that, under the facts in this case, those legal principles justified the decisions of the learned Judge, at the trial of the cause. There appeared to me to be some justice in the plaintiffs' claim for damages or compensation, if the defendants, while occupying the plaintiffs' dock, were laboring as well for their own profit, in saving the vessel and cargo, as for the public or the plaintiffs' benefit, in removing the wreck and disencumbering the slip.

And this view seemed, at first sight, to find support in the testimony of the witness Lewis, where he states that, in the fall of 1854, "he had lifted the vessel so that she might be carried anywhere in the harbor, but that, to make it a sure thing," he took her further into the slip, and had partially unloaded her, when, fearing the effect of the frost upon the heavy chains by which he held her up, (it being then about the middle of December,) he discontinued operations until the spring, expecting that at that time he would complete the work in a couple of weeks.

This looked, at first, like neglect of duty to the plaintiffs—omitting to remove the vessel out of the slip, when the operator testified "that he might have carried her anywhere in the harbor;" and it appeared, too, as if the defendants, (or their agents, the wreckers, which is the same thing, in effect,) had ventured on, or assumed the responsibility of this neglect, under the temptation which the state of things then presented—of speedily unloading the vessel and possessing themselves of the cargo, to their own immediate emolument. But further reflection removed this impression. To take the vessel out of the plaintiffs' slip,

and into some suitable location, was the necessity of the case. To take her out of the plaintiffs' dock and drop her, as an obstruction in the adjacent or other waters of the harbor, would not be a fulfillment by the defendants of the duty which they had assumed to perform, and it is evident that it was apprehension of some such mishap that induced Lewis to lighten the vessel before taking her out of the dock. "To make it," he says, "a sure thing"—that is, to make the successful removal of the vessel "a sure thing"—he took her further into the dock, to unload and lighten her, but found it necessary, when he had her there, to suspend the work on account of the frost, until the spring. This indicates no negligence or disregard of the plaintiffs' rights. Even if there were in it an error of judgment, (and it is not shown that there was,) the defendants having committed the work to Lewis, whose ability, skill and experience in business of this character, are proved to be of the first order, they would not be held responsible for an honest error of judgment committed by him in the prosecution of the work. And, except this statement in the testimony of Lewis, and the unsupported and very loose and unreliable opinion or conjecture of one or two unskillful and inexperienced witnesses, there is no evidence whatever upon which a question of neglect could be raised, (and the defendants are only liable for neglect, or want of care,) or upon which any doubt could be suggested that the removal of the obstructions, caused by the sunken wreck, was not, at all times, the object, to the accomplishment of which the efforts of the defendants and their agents were faithfully directed.

To endeavor to save as much as possible of the wreck and cargo, was not incompatible with the entire fulfillment by the defendants of their whole duty to the plaintiffs in this matter; and I do not see that any effort which they made in that direction did interfere with that duty. No reasonable plan could be proposed, and no one could, in reason, be required to adopt any plan, for the accomplishment

Taylor et al. v. The Atlantic Mutual Insurance Company et al.

of the expensive and laborious work to be undertaken, that would not embrace the design of rendering the wreck and cargo available to defraying, in whole or in part, the necessary expenditures of the work. And if such was the design of the defendants in this instance, it affords no ground for a recovery of damages against them by the plaintiffs; and, besides, there is nothing in the case from which it can be inferred that, if the labor expended was directed solely and exclusively to the removal of the wreck, without any regard to the recovery of the cargo or ship's materials, the operation would have been more expeditious or successful than it was in reality.

Concurring, then, as I do, in the legal principles to which I have referred in the commencement of this statement, I can see no ground upon which the defendants can be held liable. They were only bound, at the utmost, to exercise due diligence and care; this, I think, they have done. There was no doubtful question in the case, which it was proper or necessary to submit to the Jury, and the direction given to them by the Court, to find a verdict for the defendants, being correct, the judgment should be affirmed, with costs.

BARBOUR, J., (dissenting.) The case, briefly stated, is this:

The ship *Joseph Walker*, while lying at the plaintiffs' wharf, in New York, in December, 1853, with cargo on board, was partially burned, and sunk to the bottom, alongside the wharf, remaining attached thereto by her chain cable, leaving a portion of her hull above the water, and occupying such a position as to exclude all other vessels from access to that part of the wharf in front of which she lay. The injury to the vessel and cargo being more than half their value, they were abandoned by the owners to the defendants, who were insurers, as a total loss, under the policies; and the defendants, thereupon, accepted the abandonment and paid the insurance. The defendants did not abandon the ship and cargo as derelict, but, on the

contrary, entered into a contract with a Mr. Bell, an experienced wrecker, providing for the raising of the ship and cargo by him, in consideration of the payment to him of a large per centage of the proceeds to be derived from sales of the same when raised, or such portions thereof as should be saved. Under this agreement, Bell, and Lewis, who became his partner and succeeded him, made various efforts, more or less vigorous, to raise and save the vessel and cargo. Those attempts were continued, with the exception of some intermissions on account of the weather, until April, 1855; during which period portions of the cargo were taken out, landed upon the plaintiffs' wharf, and carried away and sold by the contractors, who also used the wharf as a passage way to and from the ship, for their men and materials. In April, 1855, the Mayor of the city, claiming that the vessel was a public nuisance there, forcibly stopped the proceedings of the contractors, took possession of the ship, and entered into a contract with a Mr. Jones, who agreed to raise and remove the vessel for \$13,000, to be paid him by the city; and Jones, thereupon, sub-let the job to others, who undertook to raise and save the ship and cargo, and to receive as compensation therefor 50 per cent of the net proceeds of the vessel, and 62½ per cent of her cargo. On the 15th of October, 1855, the Mayor again took possession of the ship, and on the 25th or 26th of the same month removed her from the dock; whence she was taken to the Atlantic docks, in Brooklyn. The vessel was then worth \$10,000, and her cargo was sold for about \$5,000.

It is not necessary to consider the question as to whether the underwriters, upon the abandonment of the ship and cargo to them, and their acceptance of such abandonment, took the ownership of the same *cum onere*, so as to become, *ipso facto*, liable to the performance of all the duties and obligations touching her future disposition, to which the insured owners were then subject; nor the question as to what the duties and liabilities of such former owners, considering the situation and condition of the ship, were, at

Taylor *et al.* v. The Atlantic Mutual Insurance Company *et al.*

that time; for, even if they had the right, at their option, to abandon the vessel and her cargo as derelict, it is quite clear that they elected not to abandon, but to take possession of the vessel; and that for a year and two months after they became the owners, the defendants, through the persons with whom they had entered into a contract and formed a *quasi* partnership for that purpose, retained such possession and controlled and managed the vessel, not for the purpose of removing her from the slip at the earliest practicable period so as to release the plaintiffs' wharf from the incumbrance, but with the intention, principally, if not solely, of saving the ship and cargo, with a view to the profit or remuneration to be derived from the sale of the same, to the exclusion of all other vessels from that portion of the plaintiffs' wharf, and to the great injury of his business.

If the defendants had abandoned the ship and cargo as derelict, the plaintiffs would have had a right to take possession, either for the purpose of removal as an obstruction to their wharf, or, in case it could be done without injury to others, in order to save the ship and cargo for their own benefit, if they should see fit so to do; and of this right they were deprived by the acts of the defendants and their employees in taking and holding exclusive possession of the vessel, not for the purpose of removing it out of the plaintiffs' way, but of placing her and her cargo in such a condition as would, and did, enable the defendants to make money.

Tested by the rules of common honesty, it was the duty of the defendants, upon assuming the ownership and control of the vessel, either to remove her from the plaintiffs' wharf, without unreasonable delay, as a wreck and an obstruction to their business there, or to compensate them for the injury caused by such obstruction. For nearly two years, owing to the failure of the defendants to remove her, the vessel continued to occupy the same position, though partially submerged, in front of the plaintiffs' wharf, which she filled prior to the accident; and for this

Taylor *et al.* v. The Atlantic Mutual Insurance Company *et al.*

the plaintiff is entitled to compensation. In *Brown v. Mallett*, (5 Com. B. R., 599; *S. C.*, 12 Jur., 204,) a case somewhat similar to this, Justice MAULE said: "The liability of the owner is the same whether his vessel be in motion or stationary, floating or aground, under water or above it; in all these circumstances *the vessel may continue to be in his possession and under his management and control*;" and "if so, he is liable for injuries caused by it;" and he repeats, in effect, that where the control of the ship is retained, liability accompanies it.

The evidence in this case was sufficient, I think, to justify the Jury in finding, as a fact, that the ship could have been removed from the slip in a very short time if the efforts of the defendants had been directed to such removal merely. One witness, an agent of a wrecking company, and himself a wrecker of considerable experience, says that the ship could have been taken out within two weeks after she was sunk. Lewis, one of the contractors, testifies, that in August, 1854, the ship was actually raised, so that when the tide rose she lifted free and clear; and that he could then have carried her anywhere in the harbor; and I think it may reasonably be assumed from his testimony that his failure to remove her at that time was induced by his desire to take such further steps as would insure the safety of the vessel and the preservation of her cargo, out of which his compensation was to be derived. Even if this were otherwise, however, it appears to me that under the rule as laid down by Justice MAULE, the plaintiff was entitled to recover upon the evidence as it stood at the time the Judge, upon the trial of this action, directed the Jury to find a verdict for the defendant, or at least that the evidence was sufficient to require a finding of facts by them.

For these reasons, I am of opinion that the judgment should be reversed and a new trial granted.

MONELL, J. concurred in the dissenting opinion of BARBOUR, J.

Judgment and order affirmed.

Tracy v. New York & Harlem Railroad Company.

WILLIAM TRACY, Plaintiff and Respondent, v. THE NEW YORK & HARLEM RAILROAD COMPANY, Defendants and Appellants.

1. After an action to recover possession of specific personal property, and damages for its detention, has been commenced by the service of summons, a voluntary taking of the property, not from the defendants themselves, but by plaintiff's picking it up where he chanced to find it, does not extinguish the right of action.
2. Where the only evidence as to the time of the commencement of the action, was the testimony of the plaintiff, (a lawyer,) that he commenced the action in the morning, and after he had put the papers in the sheriff's hands for service, he found the goods lying in front of defendant's door, and took possession of them, there, about noon, or soon after noon; there being no evidence as to the time of serving the summons; *Held*, that upon this evidence a verdict for the plaintiff should be sustained.
3. In an action against a railroad company, where they rely upon a rule established by them for the regulation of business, which the Court instruct a Jury is a legal and valid rule, the rejection of evidence that the uniform usage of other companies is the same, is not error.
4. In an action to recover possession of specific personal property, and damages for its detention, it is proper that the Jury, on finding for the plaintiff, should assess the value of the property, as well as the damages, although the plaintiff has obtained a delivery before the trial. (BARBOUR, J., dissented.)
5. If the assessment of the value were not proper, the Court would not, before judgment, order a new trial on that ground. (Per BOSWORTH, Ch. J.)
(Before BOSWORTH, Ch. J., MONCRIEF and BARBOUR, J. J.)
Heard, April 14, 1862; decided, June 21, 1862

APPEAL from an order denying a new trial, which the defendants had moved for, upon a case and exceptions.

The cause was tried before the Chief Justice and a Jury, on the 10th of October, 1861. The facts upon which the action arose, and the defendants' motion for a nonsuit at the trial, are fully stated in the first portion of the opinion of BARBOUR, J.

Upon the trial, the defendants' president testified that it was their uniform rule that baggage could not be checked, except to points to which the tickets are purchased. Defendants' counsel then offered to prove that this is

Tracy v. New York & Harlem Railroad Company.

the uniform rule on other roads; this offer being objected to and excluded, the defendants excepted.

The defendants' attorney furnished to the Court on the argument of this appeal, printed cases, copies of which had been served on the plaintiff's attorneys, and which had, written in them, a paper purporting to be the Sheriff's return of the service of summons on the defendants on a day subsequent to the one on which it was delivered to the Sheriff, and on which the plaintiff took possession of the trunks. The plaintiff's counsel objected to such written paper being considered as part of the papers on the appeal, and the Court ruled that it be disregarded, as no part of the case.

Charles W. Sandford, for defendants, appellants, argued the several questions passed on in the opinions of the Court; and, as to the point that plaintiff must show that defendant unlawfully still holds possession, cited *Elwood v. Smith*, (9 How. Pr. R., 528,) *Roberts v. Randel*, (3 Sandf. S. C. R., 707; 5 How. Pr. R., 327,) *Brockway v. Burnap*, (8 How. Pr. R., 188.)

William Curtis Noyes, for plaintiff, respondent, reviewed the evidence and exceptions, and cited, in opposition to defendants' authorities, *Van Neste v. Conover*, (20 Barb., 547.) Also to the point that the action was commenced by delivery of the papers to the Sheriff, *Gregory v. Weiner*, (1 Code R., N. S., 210.)

BY THE COURT—BOSWORTH, Ch. J. No exception was taken to the charge except "to all that part of the charge in relation to the value of the property and damages."

It is objected on this appeal that it was error to direct the Jury to find the value of the property. It is proper, in an action of this kind, that the Jury should assess the value of the property, though the plaintiff has obtained a delivery of it. (Code, § 304, sub. 4.) The value of the property recovered affects the question of costs when the damages recovered do not amount to fifty dollars; and

• Tracy v. New York & Harlem Railroad Company.

even if it did not, and if the judgment should be for the damages assessed, and only that, the assessment of the value would be an idle ceremony, not prejudicial to either party. The judgment is not entered, and when entered (if the plaintiff succeeds on this appeal) it must be entered in proper form.

The verdict cannot be set aside as contrary to evidence. The Jury, in finding for the plaintiff, have merely credited positive testimony. It cannot be said that they erred, because they believed it, or have found without, or contrary to evidence.

There was no error in rejecting the testimony as to the uniform usage of other roads, as respects the delivery of baggage. The Jury were instructed that the rule adopted by this road on that subject was legal and valid; and whether all other roads had made and enforced the same rule was wholly immaterial.

There is no ground on which the defendants can succeed, unless it be that first stated as the basis of their motion for a nonsuit.

On the facts found by the Jury, a cause of action accrued to the plaintiff, on the refusal to deliver his baggage to him at Golden's Bridge, and carrying it thence to New York. That cause of action has never been released or otherwise extinguished. It accrued on the 14th of August, 1860. The plaintiff testified, without objection, that he commenced the action the next morning, and after he had placed the papers in the hands of the Sheriff's officers for service, he went up town, found his trunks, outside the door, under the arch that goes into the depot, and sent Mr. Smith for an expressman, who took them to his house.

George J. Smith testifies that he went to the Sheriff's office with Mr. Tracy, and awaited there until the papers were delivered to the Sheriff for replevying the baggage, and then went up with Mr. Tallmadge and Mr. Tracy to the station, about three-fourths of an hour after delivering process at the Sheriff's office.

There is no cross-examination to show what the plain-

Tracy v. New York & Harlem Railroad Company.

tiff had done before he found his trunks, which he testified amounted to commencing the action. Whether in his view of the fact which he affirmed, it included service of the summons or not, he was not asked to disclose. He swore that he found the trunks after he commenced the action, and there was no evidence offered to explain or contradict this testimony.

Chapter II, of title VII, of part II of the Code, having the statutory title: "Claim and delivery of personal property," authorizes a plaintiff in an action to recover possession of personal property, to "claim the immediate delivery of such property, either at the time of issuing summons, or at any time before answer, as provided in that chapter."

We must infer from the evidence of the plaintiff and Mr. Smith, that all the papers were executed in due form, and delivered to the Sheriff, which were essential to perfect that claim, and impose on the Sheriff the duty to take the property and deliver it to the plaintiff.

This proceeding is declared to be a provisional remedy, (title VII, part II of the Code,) and when all the papers requisite to perfect a plaintiff's right to it, and have it enforced, are prepared and placed in the Sheriff's hands, for the purpose of executing the remedy, it may be said that the provisional remedy is allowed.

And by § 139 of the Code, the Court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings, from the time of the service of the summons, or the allowance of a provisional remedy. (*Burkhardt v. Sanford*, 7 How. P. R., 329.)

It is by no means clear, therefore, that taking possession of the property a few hours, or a day before actual service of the summons, would be a bar to the action, the possession having been taken after the summons, and the papers making it the Sheriff's duty to take and deliver the property of the plaintiff, had been placed in his hands to be executed.

However this may be, it is quite clear that a voluntary taking of the property after the service of the summons,

Tracy v. New York & Harlem Railroad Company.

not from the defendant himself, but by picking it up where the plaintiff chanced to find it, does not extinguish his right of action, although it may affect the question of damages for the detention.

And the defendants are not in a condition, upon the testimony as it is presented to us, which enables them to say, that it is proved that the property was voluntarily reduced to possession by the plaintiff before the summons was served. The plaintiff, who must be presumed to know what is the commencement of a suit, testifies without objection, and without being asked to make further explanation, that he found and took his trunks, after he had commenced the action.

I think the order should be affirmed.

BARBOUR, J. This action was brought by the plaintiff to recover the possession of his baggage claimed by him to be wrongfully withheld from him by the defendants, and for damages sustained by the detention.

Upon the trial, evidence was given by the plaintiff sufficient and uncontradicted, to establish the following facts:

In August, 1860, the plaintiff, with his wife and two daughters, got on board the cars of the Western Railroad Company at Troy, with their baggage, with the intention of going to Golden's Bridge, a station upon the Harlem railroad, between Albany and New York. Upon arriving at East Albany the plaintiff went to the car containing his trunks, and requested the man in charge to give him checks for them for Golden's Bridge, and was informed by the baggage-master that checks could not be given to him for the reason that the office was not yet open. The baggage-master, however, told him that the trunks were all marked for Golden's Bridge; that he could get tickets from the conductor upon the cars, and that checks would then be given to him. After the cars started he applied for tickets for Golden's Bridge, to which the conductor replied, that he could not sell tickets for Golden's Bridge, but added, "I can do better for you; I have through tickets to

Tracy v. New York & Harlem Railroad Company.

New York, and can sell you a through ticket, which will answer the purpose just as well, and will not cost any more;" and at the same time told the plaintiff that the usual price of tickets was one dollar greater to Golden's Bridge, thence to New York; and, therefore, the plaintiff took and paid for the four tickets for New York. It was shown that the roads of the two companies connected at Chatham, and that their custom was to sell tickets for passage over each other's roads. On arriving at Chatham the plaintiff again asked for checks, when the baggage-master, upon looking at the tickets said, "I cannot give you checks upon these tickets, but your baggage is marked all right; you will get it at Golden's Bridge." Shortly after leaving Chatham, the conductor of the Harlem road took the plaintiff's tickets, and gave him conductors' checks for them. The plaintiff afterwards told the conductor that he wished his baggage ready for delivery at the bridge, when he was told by the conductor that, inasmuch as his tickets were for New York, the trunks could not be given to him at Golden's Bridge, unless he would pay two dollars extra; and although the plaintiff stated to him the circumstances attending the purchase of the tickets, and again demanded the trunks at Golden's Bridge, the conductor persisted in his refusal to deliver, and carried them through to New York. The plaintiff followed in another train, and on the morning of the next day commenced this action. About noon of that day the plaintiff finding his trunks at the defendants' depot in New York, took possession of them. Another witness states positively that it was between one and two o'clock when the baggage was recovered.

After this evidence was given, the defendant moved to dismiss the complaint, upon the ground,

First. That a suit for the delivery of personal property, cannot be maintained when the goods have been received by the plaintiff before the service of process; and,

Secondly. Because the defendants had a right to establish the rule that baggage would be delivered only at the place to which tickets were purchased; that the plaintiff

Tracy v. New York & Harlem Railroad Company.

was informed of this rule before reaching Golden's Bridge, and could have received his baggage there, by paying the regular fare, which he refused to do.

The first of these objections was not well founded. Without considering the question as to whether actions of this character are not commenced by the issuing of the summons to the Sheriff, it is sufficient to say that no evidence had been given, tending to show that, when the property was received by the plaintiff, the summons had not been served; but, on the contrary, it had been proved by the testimony of the plaintiff, who is himself a lawyer, that the action was commenced in the morning, and the evidence showed that the trunks had been taken possession of by the plaintiff, after the morning had expired.

Nor can the second objection be sustained. It is true that the defendants had as perfect a right to establish the rule in question, as all corporations and individuals have to adopt such rules, not contrary to law, as they may deem fit and proper for their own government; but no rule in restriction of the rights acquired by passengers, under the contract to carry them which is to be implied from the purchase and sale of their tickets, or even from their taking seats in the cars of railroad companies, who are common carriers, can affect such rights, unless the other contracting party has notice of such rules, so that it may clearly be inferred that his contract is made subject thereto.

In this case, the rights of the plaintiff rest upon the contract which is to be implied from the sale of the New York tickets to him, with the understanding, on the part of the conductor and himself, that such ticket should be good for a passage for him and his family, and, of course, their baggage, to Golden's Bridge; and there was no evidence tending to show, at the time the motion was made, that the plaintiff had any knowledge of the rule.

The Judge ruled correctly in rejecting the testimony offered by the defendants touching the usage of other roads in respect to the delivery of the baggage, as it was

Tracy v. New York & Harlem Railroad Company.

wholly irrelevant. Indeed, if admitted, it would only have *tended* to show that the rule of the defendant, in this regard, was proper; and the Judge, in his charge, went beyond that, and instructed the Jury that the rule was a reasonable and proper one. The defendants, therefore, were to no extent prejudiced by the exclusion of the evidence offered.

The verdict is fully sustained by the evidence, with the exception of that part of it which assesses the value of the property; which, as such property had been returned to the plaintiff before the trial, and was not claimed by the defendants, I consider erroneous.

The verdict is such a one as ought to and would have been rendered, if the property had not been returned to the plaintiff. As it now stands, the plaintiff is entitled to a judgment for 1,025 dollars, and it will be the duty of the clerk, unless other and further directions shall be given by the Court, to enter a judgment for that amount, and to tax and include therein costs accordingly. (Code, § 264.) This appears to me to be sufficient to show that the verdict ought not to be permitted to stand, without considering the question as to the power of a Judge to direct the entry of a judgment which does not conform in legal effect and intendment to the verdict, and the whole of it.

The Legislature, in providing by section 261 of the Code for the assessment of the value of the property, when the verdict is in favor of the plaintiff, and such property has not been delivered to him, have, by necessary implication, debarred an assessment where it has so been delivered. *Expressio unius est exclusio alterius*. (See also Code, §§ 260, 262, 264, 277; *Archer v. Boudinet*, 1 Code Rep., N. S., 372; *Rockwell v. Saunders*, 19 Barb., 474; *Woodburn v. Chamberlain*, 17 Id., 446.

The provision in the 304th section, sub. 4, of the Code, it seems to me, is in strict accordance with the other sections above cited, and merely designates the persons by whom the value of the property is to be assessed,

Phelps v. The Gebhard Fire Insurance Company.

in case an assessment shall be necessary under the 261st section.*

For these reasons I am of opinion that the verdict should be set aside, and a new trial granted, unless the plaintiff shall, within twenty days from the service of the order to be entered herein, stipulated in writing that he will take a judgment of twenty-five dollars (being the damages awarded) and the costs to which he will be entitled; in which case judgment to be entered accordingly.

No costs should be awarded to either party upon this appeal.

JANE G. PHELPS, Executrix, &c., of Anson G. Phelps, Jr., deceased, Plaintiff and Respondent, v. THE GEBHARD FIRE INSURANCE COMPANY OF THE CITY OF NEW YORK, Defendants and Appellants.

1. Executors, to whom real property is devised by their testator's will, have an insurable interest therein by virtue of the trust; and where the insurers issue a policy to the testator in his life time, which does not require him to show that he was owner in fee, nor forbid an assignment of the property, and after his death they renew the insurance in favor of his executors, without inquiry or representations as to their interest, the executors may recover thereon, although before the renewal their interest has been, without the knowledge of the insurers, but in good faith, changed to a mortgage interest, by their selling the property, and taking back, at the same time, a purchase-money mortgage.
2. Thus, where an insurance company of the City of New York, insured a resident of the city upon a house, described as "his dwelling house" in another state, but without any representations or inquiries as to its occupancy, or as to the nature of his interest; and after his death, of which they were informed, they issued to his executors, also residents of New York, successive annual renewal receipts, in the name of the estate or of the executors, and before the last of such renewals, which was given to the sole surviving executrix, she, in good faith, but without notice to the company, had sold the property, taking back a purchase-money mortgage:

Held, 1st. That under these circumstances, and upon a fair construction of the provisions of the policy, a change in the nature or extent of the

* Since this opinion was written, I have examined the amendments to the Code adopted at the last session, and find my views still further confirmed, by the fact that the Legislature have deemed it necessary to provide for cases of this character in future, by an amendment to the 4th sub. of § 304.

Phelps v. The Gebhard Fire Insurance Company.

insured's interest in the property would not invalidate the policy, the interest having been continuous and the risk not increased.

2d. That his death did not terminate the policy.

3d. That the renewals having been granted to the executors, without inquiry or representations, the company must be held to have insured such interest in the property as had become vested in the executors by the will, and by their acts as executors; and that the surviving executrix was entitled, by virtue of her interest as mortgagee, to recover, upon a loss.

(Before BOSWORTH, Ch. J., and BARBOUR and MOWELL, J. J.)

Heard, April 21, 1862; decided June 21, 1862.

THE plaintiff brought this action upon a policy of fire insurance and successive renewals thereof issued by the defendants.

By the original policy, which was issued to the plaintiff's testator, in his lifetime, the defendants insured him "against loss or damage by fire, to the amount of one thousand dollars, viz.: \$500 on his frame dwelling house, and \$500 on his frame barn, situate about two and a half miles distant from the town of Dover, Morris county, New Jersey." And the company thereby agreed "to make good unto the said insured, his executors, administrators and assigns, all such loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property as above specified during one year."

After testator's death the policy was renewed from year to year, by renewal receipts, given to the plaintiff and her co-executor. Before the last of these receipts was given, the co-executor died, and the plaintiff, as executrix, sold and conveyed the property insured, and took back a mortgage to secure a part of the purchase-money; after which the dwelling house insured, was burned. The plaintiff, on demanding payment of the loss, offered to assign the mortgage to the company, but they refused to pay, on the ground that the change in the interest was without their knowledge or assent.

The provisions in the policy and in the conditions annexed, which they relied on, and the only provisions having any bearing upon the question, were the following:

"This insurance [the risk not being changed] may be

Phelps v. The Gebhard Fire Insurance Company.

continued for such further term as shall be agreed on, provided the premium therefor is paid and indorsed on this policy, or a receipt given for the same."

"The interest of the insured in this policy, is not assignable, unless by consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect."

"If any person insuring any building or goods in this office, shall make any misrepresentation or concealment; or if, after insurance is effected, either by original policy or by the renewal thereof, the risk shall be increased by any means whatever within the control of the assured; or if such building or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect."

"Property held in trust, or on commission, must be insured as such, otherwise the policy will not cover such property; and in case of loss, the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. *Goods on storage must be separately and specifically insured.*

"If the interest in property to be insured be a *lease-hold* interest, or other interest not *absolute*, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void.

"NOTE.—By 'property held in trust,' is intended, property held under a deed of trust, or under the appointment of a Court of law, or property held as collateral security; in which latter case, this company shall be liable only to the extent of the interest of the assured in such property."

"Insurances once made may be continued for such further time as may be agreed on, the premium required therefor being paid and indorsed on the policy, or a receipt given for the same; and all insurances, original or renewed, shall be considered as made under the original representation, in so far as it may not be varied by a new representa-

Phelps v. The Gebhard Fire Insurance Company.

tion in writing, which in all cases it shall be incumbent on the party insured to make, where the risk has been changed, either within itself or by the surrounding or adjacent buildings; and if, at or before the time of renewing any policy of insurance on property where the risk has been increased by the erection of buildings, or by the use or occupation of the premises insured or of the neighboring premises, the assured shall fail to give information thereof, said policy and renewal shall be void and of no effect."

By his will the testator devised the rest, residue and remainder of his real and personal estate, (including the premises on which the buildings insured by the defendants were erected,) to his executors, who should qualify, in trust to manage, sell and convey the same, for the purposes in the will named, and gave an absolute power of sale to such of his executors as should qualify.

The cause was tried before Mr. Justice BARBOUR and a Jury, on the 13th of January, 1862; and at the close of the trial the Court directed a verdict for the plaintiff. The defendants duly excepted, and now appealed from the judgment entered on the verdict.

Bowen Whiting, for defendants, appellants.

I. The only interest insured by the policy was that of Anson G. Phelps, as owner of the fee.

The renewals, from the necessity of the case, as well as their own terms, operated simply to keep the original insurance in being, as to all its incidents. (*Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. R., 305.)

II. Plaintiff had no insurable interest, except as executrix, vested with the fee.

As mortgagee she took simply a chattel interest, and all the interest and estate which was insured she had formally conveyed, with warranty, at the time of the last renewal. (*Curtis v. Leavitt*, 1 Smith, 9.)

III. Plaintiff having conveyed and taken a mortgage, without notice to or consent of the defendants, the policy,

Phelps v. The Gebhard Fire Insurance Company.

by its terms, became void. (*Grosvenor v. The Atlantic Fire Ins. Co. of Brooklyn*, 17 N. Y. R., 391; *Day v. Poughkeepsie Mut. Ins. Co.*, 23 Barb., 623; *McLaren v. The Hartford Fire Ins. Co.*, 1 Seld., 151; *Smith v. Saratoga M. F. Ins. Co.*, 1 Hill, 497.)

John M. Mason, for plaintiff, respondent.

I. The last certificate was a renewal of the original policy, and the interest of Mr. Phelps, which was absolute, continued so in his devisees under the will, to the extent of their mortgage interest. The granting of a deed and taking back a mortgage did not change the nature of the insurable interest, to the extent of the mortgage. (*Ellis on Fire Ins.*, [Shaw's ed.,] 69; *Etna Ins. Co. v. Tyler*, 16 Wend., 397; *Gordon v. Mass. F. & M. Ins. Co.*, 2 Pick., 249; *Jackson v. Mass. Mut. Fire Ins. Co.*, 23 Id., 18; *Tittemore v. Vermont Mut. Ins. Co.*, 20 Vt. R., 546.)

II. If the policy became void, the certificate was a new insurance of the interest of the executrix, whatever that might be, whether owner or mortgagee.

III. It is not necessary that any representation should be made as to the interest of the insured, if no inquiries are made. (*Pars. Merc. Law*, 509; *Traders' Ins. Co. v. Robert*, 9 Wend., 404; *Locke v. N. A. Ins. Co.*, 13 Mass. R., 61; *Williams v. Smith*, 2 Cai., 253; *Niblo v. N. A. Ins. Co.*, 1 Sandf. S. O., 551; *Etna Ins. Co. v. Tyler*, 16 Wend., 388; *Kernochan v. N. Y. Bowery Ins. Co.*, 5 Duer, 1; 17 N. Y. R., 428; *Turner v. Burrows*, 5 Wend., 546; *Ellis on Fire Ins.*, 69; *Bartlet v. Walter*, 13 Mass. R., 268.) If the insurer deems it material to know the interest, he should make special inquiries. (*Strong v. The Manf. Ins. Co.*, 10 Pick., 40; *Fletcher v. Commonwealth Ins. Co.*, 18 Pick., 419; *Niblo v. N. A. Ins. Co.*, 1 Sandf. S. O., 551.)

BY THE COURT—BOSWORTH, Ch. J. At the date of the policy (December 4, 1857,) the assured resided in the City of New York. The policy does not so state, nor is the fact directly proved. He died on the 18th of May,

Phelps v. The Gebhard Fire Insurance Company.

1858, having left a last will and testament, which was duly proved before the Surrogate of the County of New York, and letters testamentary were issued thereon to the executrix and executor therein named, July 30th, 1858. The plaintiff and John L. Mason, (since deceased,) qualified as executrix and executor. The fact of the residence of all these parties in the City of New York was so well known that no mention appears to be made of it, either in the policy, pleadings, proofs, or points made on this appeal. Of course the insured property was not supposed to be occupied by the testator personally when the policy was made, but it was known that it was not.

It does not appear that any representation was made that the testator owned it in fee, nor does it appear that any questions were asked on the subject. The description of the property, in the policy as "his frame dwelling house" and "his frame barn," would not in case of a loss in his lifetime, make it indispensable to his right to recover, that he should prove he owned them in fee. (*The Aetna Fire Ins. Co. v. Tyler*, 16 Wend., 385.)

His death did not terminate the policy. (*Burbank v. Bookingham Mut. Ins. Co.*, 4 Foster, 550.) If he had conveyed the property in his lifetime, taking back, *eo instanti*, a mortgage to secure the purchase-money, he would, notwithstanding, have had a continuous interest in the property. That fact would not have forfeited the policy, under the clause, which declares that "in case of any transfer or termination of the interest of the insured" in this policy, "either by sale or otherwise," without the consent of the corporation, manifested in writing, "this policy shall from thenceforth be void and of no effect." The provision in this policy, on this subject, is in the words of that in *Smith v. Saratoga M. F. Ins. Co.*, (1 Hill, 497,) and it was there construed to refer to a transfer of interest in the policy, and not to a change of interest in the property insured.

Nor would a conveyance by the assured in his lifetime, and taking back, *eo instanti*, a mortgage to secure the pur-

Phelps v. The Gebhard Fire Insurance Company.

chase-money, have been a bar to a recovery, in case of a subsequent loss in his lifetime, and during the term for which the property was insured. (*Morrison v. Tennessee M. & F. Ins. Co.*, 18 Missouri, 262; *Norcross v. Insurance Companies*, 17 Penn. St., 429.)

There is no provision in the policy which, in terms, declares that it should, in such a contingency, become null and void. On general principles, the fact of a change in the nature or extent of the assured's interest in the property, would not invalidate the policy, the interest having been continuous, from the inception of the policy to the time of the loss, and the risk not having been increased.

We think that the rights of the present plaintiff to recover, are quite as clear, if not more free from doubt, than those of the testator would have been were he living, and a certificate of renewal had been issued to him after conveying, and taking a mortgage of the premises to secure the purchase-money, and a loss had occurred after such renewal.

After the death of the testator, and on the third of December, 1858, the company issued a certificate of the renewal of the policy for one year, on a receipt of the premium therefor, from "the estate of Anson G. Phelps, Jr."

On the 30th of November, 1859, a further or second certificate of a renewal of the policy for one year from the fourth of December, 1859, was executed and delivered, on a receipt of the premium therefor from "Mrs. Jane G. Phelps, *Executrix*, and John L. Mason, *Ex'r* of A. G. Phelps, Jr."

On the 3d of December, 1860, (John L. Mason having died in the meantime,) the company issued a further certificate of the renewal of the policy for one year from the 4th of December, 1860, on the receipt of the premium therefor "*from Mrs. Jane G. Phelps, &c.*"

The loss occurred on the 14th of February, 1861.

No representations were made, and no questions were asked at the time of either renewal, as to the nature or

extent of the interest designed to be protected by extending the policy and continuing it in force.

The company knew that Anson G. Phelps, Jr., was dead, and the renewals were not granted, to keep him insured on property owned by him in fee; whether the estate had been devised by his will, to his executors, in fee, upon specified trusts, or whether they had been clothed with authority to sell, and had exercised that authority, and in so doing had taken a mortgage to secure the purchase-money, the company did not consider it important to inquire. The plaintiff did not misrepresent, and has not practiced bad faith, and has done nothing subsequent to any renewal to increase the risk.

Since the renewal granted to "Mrs. Jane G. Phelps, &c.," alone, there has been no change in her condition as to the property; she was then a mortgagee of the premises, under a mortgage to her as executrix, and continued to be such up to the time of the loss.

Executors, as such, are merely representatives of the personal property of a deceased; as mere executors, they have no interest in or control over the real estate of their testator. When property is devised to executors in trust, they act *quo ad hoc* as trustees, and account for their acts in regard to the real estate so devised, as trustees, (2 R. S., 82, § 6; Id., 94, §§ 65 and 66.) By chap. 272, of the Laws of 1850, the powers of the Surrogate were extended, in the matter of settling the accounts of trustees created by a last will and testament.

Whatever may be the legal effect of granting the several renewals, under the circumstances under which they were made; and whatever may be the obligation thereby imposed on the insurance company, there are no words found either in the policy or in the renewal certificates which, (being construed in their usual acceptation,) declare in terms, such legal effect, or the nature and extent of such obligation.

Looking at the parties intended to be insured by the grant of the renewal certificates, and considering the facts,

Benson v. New Jersey Railroad and Transportation Company.

that executors merely as such, can have no interest in the real estate owned by the testator at the time of his decease, but may be made by the will trustees of the real estate, with a power to sell on credit, or may be invested with a naked power to sell and convert, and to sell wholly or in part on credit, and that no representations were made or questions asked; the insurance company must be deemed to have intended to insure, and to have insured such interest in the real estate in question as had become vested in the executors by the terms of the will, and by their lawful acts in the due exercise of the powers conferred on them thereby and the grant of letters testamentary to them thereon.

The risk originally taken not being increased by this construction of the policy, and this construction not being opposed to anything expressed in it, or by the fair import of either of its provisions, this construction should be maintained, as obviously conforming to the intent of the insurer and insured, manifested by their acts and the circumstances under which they were performed.

The judgment should be affirmed.

BERNHARD BENSON, Plaintiff and Respondent, v. THE
NEW JERSEY RAILROAD AND TRANSPORTATION COM-
PANY, Defendants and Appellants.

1. In an action against a carrier of passengers, to recover damages for a failure to carry the plaintiff within the appointed time, to the place for which he had taken passage, by reason whereof he did not perform his errand there, and was detained at expense, and to the injury of his business at home, he must produce some evidence that if he had arrived at the appointed time he might have done his errand and would have promptly returned, or that he could not, with due effort, accomplish his errand by reason of his delay in arriving. Nor can the plaintiff, in such action, recover his expenses and the damages to his business during a sojourn of several days, without some proof as to the time when he first ascertained that he could not accomplish his errand, and might, therefore, return.

Benson v. New Jersey Railroad and Transportation Company.

2. The fact that his errand was to receive a loan of money, previously promised to him, and that, not receiving it, he was without money for the expenses of returning until he received it from home, is not enough to show a necessity for delaying his return, if he made no effort to borrow, and does not show that there was any difficulty in his doing so.

(Before all the Justices.)

Heard, May 24, 1862; decided, June 21, 1862.

THIS was an appeal by defendants from an order denying a new trial of the cause, and from the judgment entered for plaintiffs, on the verdict in their favor, which they recovered at a trial before Mr. Justice MONCRIEF and a Jury, on the 2d and 4th days of December, 1861.

The facts sufficiently appear in the opinion of the Court.

Edgar S. Van Winkle, for defendants, (appellants,) as to the point that the damages claimed were not the necessary and natural result of any breach of the contract, cited *Griffin v. Colver*, (16 N. Y. R., 489,) *Masterton v. Mayor, &c.*, (7 Hill, 61,) *Blanchard v. Ely*, (21 Wend., 342;) 2 Pars. on Cont., 432, 467; 1 Chit. Pl., 332, 370, 395; *Bedell v. Powell*, (13 Barb., 183;) *Crain v. Petri*, (6 Hill, 522;) *Viner's Abt., Damages*; 1 Chit. Pl., 370; *Loker v. Damon*, (17 Pick., 284,) (*Peters v. Whitney*, (23 Barb., 24,) *Blanchard v. Ely*, (21 Wend., 342;) and see 13 Wend., 611; 4 Sandf., 514; 3 E. D. Smith, 144.

L. E. Bulkeley, for plaintiff, (respondent.)

BY THE COURT — BOSWORTH, Ch. J. The Jury rendered a verdict in favor of the plaintiff for \$108.75. This is made up of 75 cents extra fare, \$8 for plaintiff's expenses, at \$2 a day, for four days, in Philadelphia, and \$100 for the loss of profits in his business, four days, at \$25 per day.

The plaintiff testifies that he received a telegraph despatch to meet a party in Philadelphia before seven o'clock P. M., of a day named. That, by reason of not being carried in the train for which he had bought a ticket, he arrived there about half-past nine. His testimony is: "I

had to remain there till Saturday, being too late to meet the party that evening; the next morning, about ten o'clock, I went to the place to see the parties, but I could not, on account of a death that took place the night previous,—so I was informed by the lawyer."

Again, he says, that he went to negotiate a loan on some property in that place which had been "willed" to him. His testimony is: "That is what I went for; I had been there before, trying to do so, and the parties agreed to loan the money, and I was to go there that afternoon and get it; we had seen each other previous, and they telegraphed me to meet them; the name of the man was Lyons; * * he never loaned it; I stayed in Philadelphia till I got money to go home; I would have gone before if I had had the money."

There is no proof nor any ground for presuming that the plaintiff would have seen the parties on the day he reached Philadelphia, if he had arrived at seven P. M., instead of nine and a half P. M. If a death in the family of those parties occurred that evening, (the only evidence of which was hearsay,) and for that reason he could not see them the next day, there can be no presumption that he could have seen them between seven and nine and a half P. M. of the previous evening. He does not appear to have made any effort to see them, and relied on the information of some one, which may have been incorrect. He failed to procure the loan he went to negotiate. He concedes he did not remain four days on that business, and does not state on what day he ascertained that no loan could be procured. He says he would have returned sooner if he had had money to pay his expenses there and home.

Without any proof that he could have seen the parties he went to see on the day of his arrival, provided he had arrived at seven instead of nine and a half P. M.; without any proof that he failed to procure a loan, by reason of his later arrival, and without proof as to when he first saw those parties and ascertained that no loan would be made,

White v. Jaudon.

he recovers \$100 for the loss of profits in his business, for four days, and eight dollars for his expenses those four days, at \$2 per day.

He admits he did not attempt to borrow the small sum necessary to pay his expenses there and pay his passage home, nor suggest that there was any difficulty in the way of his borrowing it, if he had desired to do so.

While his delay there was caused by no necessity, and was continued merely because he preferred to wait until he received money from New York, rather than borrow it there, he cannot subject the defendant to the loss of his accustomed profits in his business. There is not, in such a case, any necessary or natural connection between such loss and the failure of the defendant to carry him to Philadelphia in the train for which he purchased his ticket.

On the evidence, as it stands, he was not entitled to recover the item of \$100, (loss of profits,) nor his expenses for four days, at \$2 per day.

Without proof that the parties he went to see would have seen him on the day of his arrival, provided he had been there at seven P. M., and in that event he would have returned the same evening or the next day, it is difficult to perceive on what ground he can recover anything for loss of expenses.

In this view the verdict is against evidence and the law of the case, as stated in the charge of the Judge, and the judgment and order should be reversed, and a new trial granted, with costs to abide the event. (*Knapp v. Curtis*, 9 Wend., 60.)

Ordered accordingly.

JOHN H. WHITE, Plaintiff and Respondent, v. PEYTON
and FRANK JAUDON, Defendants and Appellants.

Where a stock broker, without disclosing his principal, or the fact that he acts as broker, contracts to purchase stock, and deposits with the other party to the contract, merely as security for its performance, money which he

White v. Jaudon.

received from his principal for the purpose, such contracting party, not having parted with anything on the faith of the deposit, cannot, when sued by the principal to recover back the deposit, set off a debt due to him from the broker. (BARBOUR, J., dissented.)

(Before BOSWORTH, Ch. J., MONELL and BARBOUR, J. J.)

Heard, April 11, 1862; decided, June 28, 1862.

THIS was an appeal by the defendants from a judgment in favor of the plaintiff, entered upon the report of S. P. Nash, Esq., Referee, before whom the cause was tried.

On the 18th of July, 1861, S. Draper, the broker of White, the plaintiff, gave the defendants, who were also stock brokers, a written order, as follows :

“NEW YORK, 18th July, 1861.

“Messrs. PEYTON and FRANK JAUDON :

“Please buy one hundred (100) shares of Chicago and Rock Island and two hundred shares of Cleveland and Toledo, both buyer 60, for account and risk of

“S. Dr., per J. H. D.

“This order good until countermanded.”

On the same day the defendants made an agreement for the purchase of 100 shares of Chicago & Rock Island, notified Draper of the purchase, and requested ten per cent deposit. Draper obtained the ten per cent from the plaintiff, and paid it to the defendants as security to the seller on the purchase. No purchase was, in fact, made by the defendants, but a contract to purchase and to receive within sixty days at the buyer's option.

On the 31st August the contract was closed by Draper, by the plaintiff's order, at a loss, leaving, however, out of the \$1,000, a balance of \$613.38 in the defendants' hands, to recover which the action was brought.

The defendants claimed to set off a debt due from Draper to them, which more than exhausted the balance in their hands.

The Referee overruled the set-off, and reported in favor of the plaintiff for the full amount of the balance and interest.

It did not appear that at any time Draper disclosed, or the defendants knew that he was the plaintiff's broker, or that the \$1,000 was his money.

Clarkson N. Potter, for defendants, appellants.

I. Plaintiff had no right of action. The action should be by Draper.

II. And the parol evidence to show that Draper was an agent, was evidence to contradict what the writings say, and therefore inadmissible. (*Newcomb v. Clark*, 1 Denio, 229; *Fenly v. Stewart*, 5 Sandf., 101.)

III. In any event defendants were entitled to prove the offset they claimed.

Where one deals with another, on behalf of a third person, the person dealt with has a right to set off, when called on by such third person, any claim which he may have against the agent. (Story on Agency, §§ 390, 404, 420, 423; Paley's Agency, by Dunl., pp. 325, 151; 1 Parsons on Contracts, 53.) And this whether the amount to be set off was due when the credit was given the agent, or subsequently. For the principal derives his rights through his agent, and stands in his stead. (Authorities cited; *George v. Claggett*, 7 Term R., 359; *Rabone v. Williams*, Id., 361; *Lime Rock Bank v. Plimpton*, 17 Pick., 159; *Hogan v. Shorb*, 24 Wend., 458.)

IV. Nor does defendants being stock brokers affect this rule, for the course of dealing among stock brokers is not as brokers, but as principals. (*Child v. Morley*, 8 Term R., 614.)

Jeremiah Larocque, for plaintiff, respondent.

I. It was competent for plaintiff to prove that the written order from Draper to defendants was in fact given for plaintiff's account and benefit. This did not contradict the order. (*Gunn v. Cantine*, 10 Johns., 387; *Dykers v. Townsend*, 24 N. Y. R., 57.)

II. Plaintiff could sue in his own name, although the defendants had not previously known him as the principal

White v. Jaudon.

in the transaction. (*Del. and Hud. Canal Co. v. Westchester Co. Bank*, 4 Denio, 97, and cases cited; *White v. Chouteau*, 10 Barb., 202, and cases cited, p. 204; 1 Chitty's Pleading, 7, 8, 9, marg. fols., and cases cited in notes; *Vischer v. Yates*, 11 Johns., 23; *Yates v. Foot*, 12 Id., 1.)

III. If plaintiff could sue in his own name, there was, of course, an end of any right of set-off. (2 B. S., 354, marg. page; Code, § 150.)

IV. Defendants, neither by their answer nor offer of evidence, sought to, nor could they, assert or maintain any right of lien upon the balance of this special deposit, for the prior indebtedness of Draper to them.

1. A stock broker, as such, has no general lien upon anything which has not been specifically pledged to him. (Russell on Factors and Brokers, 193 and 194, and cases cited; 32 Law Library, N. S., 127, 128.)

2. Even in such cases, the right of lien exists only in regard to claims arising out of the same factorship, banking or insurance business. It does not exist in regard to indebtedness not connected with that business. (Cross on Lien, 260, 277; 18 Law Library, N. S., 172, 182; Smith's Mer. Law, 340; 1 Law Library, N. S., 202; *Weldon v. Gould*, 3 Esp. N. P. R., 268; *Houghton v. Matthews*, 3 Bos. & Pul., 485; *Lanyon v. Blanchard*, 2 Camp. R., 597; 1 Condy's Marshall, 301.)

V. The evidence as to defendants' prior knowledge, that the orders given by Draper were not for his own account, having been withdrawn, the exception falls, taken by the defendants; but if it had not been withdrawn, although unnecessary, it would have been admissible.

VI. Defendants' offer of proof that they understood the order to be for Draper's own account, and had no notice to the contrary, was irrelevant and inadmissible.

VII. The evidence of usage of brokers in New York, was also entirely irrelevant and inadmissible. (*Horton v. Morgan*, 19 N. Y. R., 170.)

VIII. The exception to the Referee's not finding whether the order was or not given by Draper as an order on his

own personal account, without notice or knowledge of any agency, is not well taken. He did find that it was for plaintiff's account; and the question of knowledge was immaterial.

MONELL, J. That Draper was in fact the broker of the plaintiff; was employed by him to make the purchase; and that the plaintiff furnished the \$1,000 deposit, is conceded. The defendants claim of set-off rests, in Draper's having given the order in his own name, and his furnishing the money as his own, without disclosing his principal. The elementary writers make a distinction between factors and brokers. The latter are described as persons employed to make bargains and contracts between other persons in matters of trade, for a compensation commonly called brokerage; while the former is intrusted with the property which is the subject of his agency. (1 Parsons on Contracts, 78; Story on Agency, § 28.) Parsons says, (vol. 2, p. 250,) a broker being one to whom goods are not intrusted, and who usually and properly sells in the name of his principal, and who is understood to be only an agent. Whether he sells in his own name or not, he stands only on the footing of an agent; and hence, he says, if an action be brought by the agent, in his own name, for a debt due to his principal, the defendant may set off a debt due from the principal. And Story says, (§ 28,) if a broker sells the goods of his principal, in his own name, (without any special authority to do so,) inasmuch as he exceeds his authority, the principal will have the same rights and remedies against the purchaser, as if his name had been disclosed by the broker.

The right to set off a debt against the factor when the principal is not disclosed, arises, first, from the factor's having the goods in his possession, and, second, from his general lien. In the case of brokers, with the single exception of insurance brokers, a general lien does not exist. (Russell on Factors, 193.) And it is only in virtue

of this general lien in favor of factors, that they have the right to dispose of the property as their own.

The \$1,000 deposit was as security that the contract of purchase would be fulfilled. It was to indemnify the defendants against loss, if Draper should fail to comply with the terms of the contract. It could be held for that purpose, and for no other. Upon Draper's failing to complete the purchase, it could be retained to meet any loss occasioned by a depreciation of the stock. In this case it was so used to the extent of \$386.62.

The defense of set-off of a debt against Draper was properly overruled. Neither under the Revised Statutes, as a set-off, nor under the Code, as a counterclaim, could it be allowed. It did not exist in favor of the defendants against the plaintiff. (3 R. S., (5th ed.) 635, Code, § 150.)

The transaction constituted Draper the broker of the plaintiff, and it is immaterial whether he made the contract in his own name or in the name of his principal. He had no general lien on the plaintiff's money which gave him a right to dispose of it to the plaintiff's prejudice; and so long as the defendants parted with nothing, made no new advance upon the contract or upon the moneys deposited as security, they acquired no right to absorb the plaintiff's money in extinguishing a debt due from Draper to them.

It was not necessary to prove that Draper was the plaintiff's broker. The transaction itself sufficiently characterized the nature of his agency, and the existence of the fact of agency, whether known to the defendants or not, would deprive the defendants of the right to retain the plaintiff's money to pay Draper's debt.

Any evidence, therefore, tending to show that the defendants were informed for whose account the order was given, was immaterial, and its admission under objection was error.

The subsequent withdrawal of this evidence, however, by the plaintiff, cured the error.

White v. Jaudon.

The defendants have no equity. They lost nothing, and should not gain anything from a third and innocent party.

I see no reason for disturbing the judgment. It must therefore be affirmed.

BOSWORTH, Ch. J. Russell, on Factors and Brokers, states the law to be, that only one class of brokers possess the right of general lien possessed by factors. (pp. 191, 196.) That class consists of insurance brokers. I find no case which holds that a stock broker possesses this right. The justice and equity of the case are with the plaintiff, and I am unwilling to reverse a judgment which is just in itself, without any authority to justify the reversal, especially when the judgment is supported not only by its intrinsic justice, but by standard writers upon elementary law.

BARBOUR, J. (dissenting.) It is quite clear, upon the testimony, that the funds furnished to the defendants by Draper, to be used as security, were not the identical \$1,000 which had been sent to the latter by the plaintiff; Draper having given his own check to the defendants for a much larger amount, out of which the \$1,000 was to be taken and applied by them, and having deposited to his own credit, or otherwise appropriated the funds transmitted to him by the plaintiff. The plaintiff, therefore, is not entitled to recover the specific funds deposited, as in an action of replevin, or for the delivery to him of personal property of which he is the owner, and which is unlawfully detained from him. If he has any standing in Court to recover the money deposited by Draper, it must be by virtue of his right to claim the substituted fund. It may be added here, that the finding of the Referee to the effect that the \$1,000 placed in the hands of the defendants by Draper was the same money which was received by him from the plaintiff is erroneous, the evidence, which is entirely uncontradicted, showing that it was not the same. He has also erred in finding, as a fact, that the deposit was made with the defendants when the order was given,

White v. Jaudon.

instead of at the time the statement of the purchase was rendered by them. As these questions of fact, particularly the former, may be of importance if the case should be taken to the Court of dernier resort, I think that, under the defendants' exceptions, the General Term should reverse the judgment and direct a new trial for this reason.

Upon the trial the defendants offered evidence to prove, first, that in receiving the order, the defendants understood the order to be for Draper's account, and his only, and that they had no notice or information to the contrary until after this action was commenced; second, that by the uniform and established usage and custom of brokers and dealers in stock in the City of New York, the purchaser and seller are uniformly regarded and treated, each by the other, as principal, and as making any sale and purchase on his own account, unless at the time of giving the order he declares the same to be for the account of some other person named by him; and, third, that at the time the order was given, Draper was indebted to the defendants in a sum exceeding \$9,000, which, at the time of the trial, was still due and unpaid. The testimony in each case was objected to by the counsel for the plaintiff, and excluded by the Referee, whereupon the defendants duly excepted.

The exclusion of the evidence thus offered was erroneous in each instance. The proof of the non-disclosure of the name of the plaintiff, and of the custom of brokers, was not offered for the purpose of invalidating the order, or changing the effect of the terms employed, but to support it by removing any ambiguity that might have been supposed to exist, involving the intentions of the parties, by reason of the relation which had been proved between the plaintiff and Draper, and was therefore admissible. It was upon this principle that the Court held, in *Child v. Morley*, (8 Term R., 614,) that the fact as to whether, by the general usage of the Stock Exchange, brokers contracting for the sale of stocks, and not disclosing the names of their principals, were considered as

impliedly pledging their own credit for the faithful performance of the contract, may be proven.

So, too, as to the evidence of Draper's indebtedness to the defendants. It is true that an unknown principal may recover for goods sold by his agent, and will be liable, when discovered, for goods purchased by him; but, when the name of the principal is not disclosed, that is so only in cases where he assumes the liabilities and obligations of his agent, and stands in his place. Where a principal permits his agent to deal as apparent principal, and afterwards intervenes, the person dealing with such agent is entitled to be placed in the same situation as if the agent had been the real contracting party, and is entitled to the same defense, whether it be by payment or set-off, as he would have been entitled to against the agent and apparent principal, had there been no such intervention. (*Carr v. Hinchliffe*, 4 B. & C., 547; *Gordon v. Ellis*, 2 Com. B. R., 821; *George v. Clagett*, 7 Term R., 359; *Rabone v. Williams*, Id., 360, n.; *Tucker v. Tucker*, 4 B. & Ad., 745; *Isberg v. Bowden*, 22 L. & Eq. R., 551; *Hogan v. Shorb*, 24 Wend., 458; Story on Agency, §§ 390, 404, 420, 423; Paley on Agency, 151, 325; 1 Parsons on Cont., 53.) And, in this case, Draper so dealt with the defendants as to exclude the idea that he acted as agent for another person. It is not a mere question of lien; but the defense of the defendants rests upon their right to offset a demand which they had against the person with whom they dealt, in liquidation of a balance that otherwise would have been due from them to him, according to the conditions of the contract between them.

It may properly be said, too, that although the defendants are called brokers, they did not act simply, if at all, as brokers, in the restricted sense in which that term is used in the books; that is, as applied to persons who are merely go-betweens for the parties in interest, within the knowledge of such parties, making their bargains for them, selling by samples, &c., and never having the property in their possession, nor meddling with its proceeds. Here the defend-

The Mayor, &c., of N. Y. v. The Exchange Fire Insurance Company.

ants, under Draper's directions, did all this; and may, therefore, be considered, with reference to this transaction, as factors.

The admission of parol evidence to show that the plaintiff was the real party in interest, although that fact was not disclosed to the defendants, seem also to have been erroneous, the only object and effect of it being to contradict the written order, which directs the defendants to purchase the stocks for the account and risk of Draper, and the bought and sold note, furnished to Draper at the time the \$1,000 was advanced, which declares upon its face that the stock was purchased for his account and risk.

The judgment should therefore be reversed, and a new trial granted.

Judgment affirmed.

**THE MAYOR, &C., OF THE CITY OF NEW YORK, Plaintiffs
and Respondents, v. THE EXCHANGE FIRE INSURANCE
COMPANY, Defendants and Appellants.**

1. The Corporation of the City of New York, with the consent of the counsel to the Corporation, may appear, in actions to which they are parties, by other attorneys of record, and other counsel.
2. Under a lease of vacant ground, at a nominal rent, with covenants on the part of the lessees to erect a valuable building of a permanent nature, and at the expiration of the term to surrender the premises in as good condition as reasonable use and wear will permit, damages by the elements excepted, and with no reservation of a right to remove the building, such building belongs to the lessors, at the expiration of the term, and they then have an insurable interest therein.
3. Where a building was originally constructed, and several times used, for the purposes of an exhibition of industry, or fair; and the defendants, knowing its use, had several times insured its owners or lessees in respect to it, and the plaintiffs, subsequently becoming its owners, procured the defendants to insure them in respect to it:

Held, that the plaintiffs had a right, after obtaining such insurance, to occupy and use the building for the same purposes; but, that, if it was used otherwise than as a mere place of exhibition, or was so occupied or used

The Mayor, &c., of N. Y. v. The Exchange Fire Insurance Company.

as to render the hazard greater at the time of the fire than when the insurance was effected, the plaintiffs were not entitled to recover thereon.

Held further, that, in the plaintiffs' action upon the policy issued to them, evidence of the former insurances was admissible as tending to show, in connection with other facts, that the defendants were aware of the general purposes for which the building was used, and designed to assume a risk of the same character.

4. An exception to a refusal to charge as requested cannot be sustained, where the case states that the Judge refused to give the instructions requested, except so far as they were embraced in the charge which was in fact given, but does not state the whole of the charge given, so as to make it appear that the request was actually disregarded.

(Before BOSWORTH, Ch. J., BARBOUR and MONELL, J. J.)

Heard April 11, 1862; decided June 28, 1862.

THIS action was brought upon a fire insurance policy, issued by the defendants to the plaintiffs, in 1858, upon "the iron and glass building in the City of New York, known as the Crystal Palace, on Reservoir square, the furniture and fixtures lately owned by the Association for the Exhibition of the Industry of all Nations, and the property of exhibitors remaining in the said building."

When the cause was called for trial, before Mr. Justice WOODRUFF, and a Jury, on the 21st of May, 1861, the counsel for the defendants moved to strike the same from the calendar, or to dismiss the complaint, on the ground that the attorney of the plaintiffs, of record, was not the counsel to the Corporation, nor in any way connected with the law department of the city, and, therefore, that the plaintiffs were not legally represented before the Court; which motion was overruled and an exception taken.

The following facts were established by the pleadings, and by the evidence given on the part of the plaintiffs upon the trial:

On the 23d of March, 1852, the Mayor, Aldermen and Commonalty of the City of New York, then being the owners in fee of the lot of ground in the city, known as Reservoir square, by their indenture, leased the said premises to Edward Riddle and his associates, for the term of five years, if required and used by them for the purpose mentioned in the lease, or, if not, then for such period, not

The Mayor, &c., of N. Y. v. The Exchange Fire Insurance Company.

exceeding five years, as they might use the same, at an annual rent of one dollar, in quarter-yearly payments, whereon to erect a building of iron and glass, of a certain description, for the purpose of an Industrial Exhibition of all Nations. The lease provided that the price of admission to the building, for individuals, should at no time exceed fifty cents, and that in case of default in payment of rent, or in any of the covenants, on the part of the lessees, the lessors might re-enter and remove all persons from the premises; and the lessees covenanted and agreed, in said lease, that they would erect such building and charge no more than fifty cents for admission, and that, at the expiration of the term they should quit and surrender the demised premises in as good state and condition as reasonable use and wear thereof would permit, damages by the elements excepted.

The building, a costly structure, of a permanent character, was erected by the lessees, and used by them for the purposes mentioned in the lease, for some time. In December, 1854, John H. White was appointed by the Supreme Court, Receiver of the property of the association, including their interest in the Crystal Palace building, and entered into possession. In the fall of 1856 the American Institute was permitted, by the Receiver, to hold a fair in it, for six or eight weeks, and again in 1857. Rent was paid to the city, according to the provisions of the lease, up to the first of May, 1857.

On the 31st of May, 1858, the Comptroller of the city sent an officer, with some policemen, who in the absence of the Receiver then having the superintendence of the building, took possession thereof, and, on the return of that person, upon the same day, he surrendered the premises to the officer.

In June, 1858, the Corporation procured from the defendants a policy of insurance against fire, upon the building, then known as the Crystal Palace, together with the furniture and fixtures therein, lately owned by the Association for the Exhibition of Industry of all Nations, for account

The Mayor, &c., of N. Y. v. The Exchange Fire Insurance Company.

of whom it might concern. The policy covered a risk of \$5,000, and contained the usual clauses in regard to hazardous and extra hazardous goods, or occupations, requiring the company's consent to their exercise or deposit, to be expressed in writing in or upon the policy, in default whereof the policy should be of no effect. In October, 1858, the building, with most of its contents, was destroyed by fire, the loss upon the building largely exceeding the amount of insurance upon it; and proofs of such loss were duly made by the plaintiffs.

Upon the trial the plaintiffs waived all claim for loss on the property insured, other than the building itself.

At the conclusion of the plaintiffs' evidence, the counsel for the defendants moved to dismiss the complaint, which motion was denied and the decision excepted to.

The defendants then proved that the plaintiffs let the premises to the trustees of the American Institute, two days after the policy was issued, and that the fire occurred while they were in possession of the building, with their property and fixtures, and the property of their exhibitors.

The defendants then produced testimony showing, among other things, that at the time of the loss there were in the building a number of articles deposited, and operations carried on, as a part of the exhibition, which were specified in conditions of the policy as extra hazardous; and evidence was also given tending to show that the exhibition of the Institute was then an unusually large one, and that the quantity of steam machinery, &c., was greater than in former years.

The plaintiffs subsequently offered in evidence policies of insurance, which the defendants had issued to the Receiver of the property of the Association for the Exhibition of the Industry of all Nations, before the plaintiffs took possession; and offered, in connection with these policies, which were in substantially the same terms as the one sued on, to prove that the exhibition, at the time of loss, was substantially of the same character as those which were had during the life of such former policies.

The Mayor, &c., of N. Y. v. The Exchange Fire Insurance Company.

To all this evidence the defendants objected, but their objection was overruled, and the evidence received.

Exceptions were taken by the defendants to sundry other rulings of the Judge during the progress of the trial, and also to portions of his charge, as well as to his refusal to charge as requested.

The Jury returned a verdict for the plaintiffs for the amount claimed, and from the judgment entered thereon the defendants appealed.

John W. Edmonds, for defendants, appellants.

I. It is not competent for attorneys, not counsel to the Corporation, to prosecute this suit. The charter and ordinances of the city devolve on the counsel of the Corporation, "all the law business of this Corporation." (1 Laws of 1857, p. 882, § 26.) An attorney may always be called on to show his authority, unless there has been an acquiescence in his appearance. (*Campbell v. Bristol*, 19 Wend., 101; 99 *Plaintiffs v. Vanderbilt*, 4 Duer, 636; *King of Spain v. Oliver*, 2 Wash. C. C. R., 429; *Gillespie's Case*, 3 Yerg., [Tenn.] 325; *Allen v. Green*, 1 Bailey, [S. C.] 448; *McKiernan v. Patrick*, 4 How., [Miss.] 333; *West v. Houston*, 3 Harring., [Del.] 16; *Cartwell v. Menifee*, 2 Pike, [Ark.] 358.) And if he does not show it the name of the party may be struck out. (*Maries v. Maries*, 23 Eng. L. & Eq., 221.) Or perpetual stay be awarded. (*Campbell v. Bristol*, 19 Wend., 101.) Or the suit be dismissed on defendant's motion. (*Frye v. Calhoun Co.*, 14 Ill., 132.)

Nor can an attorney delegate his authority. *Delegatus non potest delegare*; *Vicarius non habet vicarium*. (Broom's Legal Maxims, 384; Story on Agency, §§ 13, 14, 24; 2 Kent Com., 633; Paley's Agency, 175; *Kellogg v. Norris*, 5 Eng. [Ark.] R., 18; *Ratcliff v. Baird*, 14 Texas R., 43.) Personal trust and confidence, which cannot be delegated. (*Hitchcock v. McGehee*, 7 Porter, [Ala.] 577; *Johnson v. Cunningham*, 1 Ala., 249; Tomlin's Law Dict., Tit. "Atty.," 13 Edw. L., 2 Westm.)

And this is a public office, not merely ministerial, and

The Mayor, &c., of N. Y. v. The Exchange Fire Insurance Company.

cannot be delegated. (*Ramson v. Mayor, &c., of New York*, 24 Barb., 226; *Lynch v. Livingston*, 8 Barb., 463; 2 Seld., 422.) Moreover, plaintiffs being a corporation, can appear only by attorney duly authorized.

II. The city had no insurable interest. Such interest to the amount of the loss claimed must be averred and proved. (Pars. on Merc. Law, 408, 507; *Howard v. Albany Ins. Co.*, 3 Denio, 301; *Murdock v. Chenango Ins. Co.*, 2 Comst., 210.) A mere possibility of ownership is not enough. (Pars. on Merc. Law, 507; *Carter v. Rockett*, 8 Paige, 437; *Niblo v. American Ins. Co.*, 1 Sandf. S. O. R., 551; *Laurent v. Chatham Ins. Co.*, 1 Hall, 44, and see 18 Pick., 419.)

There was no forfeiture of the building to the lessors, on the expiration of the term, by reason of the non-removal of the building during the term. In support of this point the counsel cited and commented on the following authorities, as showing the true doctrine of forfeiture of fixtures by an outgoing tenant. (*Penton v. Robart*, 2 East, 88; *Weeton v. Woodcock*, 7 M. & W., 14; per *Ld. Holt* in *Poole's Case*, 1 Salk., 368; *Prince v. Case*, 10 Conn. R., 378; *Parker v. Redfield*, Id., 496; *King v. Wilcomb*, 7 Barb., 265; *Smith v. Benson*, 1 Hill, 176; *Russell v. Richards*, 1 Fairfield, 429; *Godard v. Gould*, 14 Barb., 662; *Mason v. Fenn*, 13 Ill. R., 525; *Whiting v. Brastow*, 4 Pick., 310; *Wansborough v. Maton*, 4 A. & E., 884; *Lawrence v. Kemp*, 1 Duer, 365; *Holmes v. Tremper*, 20 Johns., 29; *Doak v. Wiswell*, 38 Maine R., 569; *Fuller v. Tabor*, 39 Id., 519; *Mott v. Palmer*, 1 Comst., 564; *Smith v. Jenks*, 1 Denio, 580; 1 Comst., 90; *Godard v. Gould*, 14 Barb., 662; *Van Ness v. Packard*, 2 Pet., 145; *Dubois v. Kelley*, 10 Barb., 495; *Pemberton v. King*, 2 Dev., 376; *Preston v. Briggs*, 16 Verm. R., 124; *Curtiss v. Hoyt*, 19 Conn. R., 154; *Ombony v. Jones*, 19 N. Y. R., 238; *Grady on Fixtures*, 183; 35 Law Lib., N. S.)

III. The Court erred as to the violation of the conditions, both in the charge and in refusals to charge as requested.

The Mayor, &c., of N. Y. v. The Exchange Fire Insurance Company.

1. This is not an equitable action to reform the contract, but a strictly legal action to enforce a contract set out in *hæc verba*.

And the only question is, what are the terms of the contract, and have they been violated?

2. In order to arrive at the terms of the contract, its language is to determine where there is no ambiguity.

In insurance law, this rule is very rigidly adhered to. (2 Park on Ins., 975; *Hobby v. Dana*, 17 Barb., 111; *Sillem v. Thornton*, 26 Eng. L. & Eq., 238; *Mead v. N. W. Ins. Co.*, 3 Seld., 530; 7 Gray, 257; *Stokes v. Cox*, 37 Eng. L. & Eq., 561; *Wall v. E. Riv. Ins. Co.*, 3 Duer, 264; see also 3 Gray, 583; 30 Penn. R., 315; 3 Dutch., 134.)

3. In this policy there was no ambiguity. It is an insurance on the building described, its fixtures, furniture and contents, and not a word as to any use that was to be, or might be made of it.

The risk was on the building, &c., as then used, and as then situated.

And the insurance was to protect the property in its then condition.

4. There was also a large increase to the risk, not only beyond the condition of things when the insurance was made, but beyond that of any former use of the premises.

Any alteration materially increasing the risk voids the policy. (2 Parsons on Mer. L., 504; 1 Dutch., 78; *Westfall v. H. R. Ins. Co.*, 2 Kern., 289; *Glen v. Lewis*, 20 Eng. L. & Eq., 364; *S. C.*, 8 Exch., 607.) And it was out of this increase of risk that the loss occurred in this case.

5. Yet the Judge ruled, that the plain language of the contract might be disregarded, and an increase of the risk be set aside, by evidence of the manner in which the building had been used in times past.

The plaintiffs' remedy, if any, was in an action to reform the contract. (1 Story Eq. Jur., § 152; *Wood v. Dwarries*, 11 Exch., 493; *S. C.*, 33 Eng. L. & Eq., 514; *Wheaton v. Hardisty*, 8 Ellis and Bl., 232; *Lyman v. U. Ins. Co.*, 2 Johns. Ch. R., 630.)

The Mayor, &c., of N. Y. v. The Exchange Fire Insurance Company.

But even in such case it must be made out by proof that such was the intention of the parties to allow such increase of the risk, and it would be open for the insurance company to show that they had no such intention, whereas it is now taken for granted, without proof, that they had. (1 Story Eq. J., §§ 152, 158; *Gillespie v. Moon*, 2 Johns. Ch. R., 585; *Lyman v. U. Ins. Co.*, Id., 630.)

Now, there is no proof in this case that the insurance company intended to assume the risk of another exhibition in the building. It is a mere inference from a former use of the building.

And, at all events, if such an inference is to be drawn, it is for the Jury, and not an inference of law, as assumed by the Judge in his charge. (*Gillespie v. Moon*, 2 Johns. Ch. R., 585; *Keisselbrack v. Livingston*, 4 Johns. Ch. R., 144.)

IV. The Court erred in admitting the evidence of previous insurances on the premises, and in its charge to the Jury on the evidence thus introduced.

This was in effect admitting parol evidence, to vary the written agreement, and permitting the Jury on such evidence to read the policy in a manner differing from its language and plain import.

1. It is of paramount importance that parties should be held to perform contracts as they have made them, and in no other manner. (*Chaffee v. Cattaraugus Ins. Co.*, 18 N. Y. R., 384; *Brown v. Same*, Id., 390; *Phumb v. Same*, Id., 394; *Lamatt v. Hudson R. Ins. Co.*, 17 N. Y. R., 199; 1 Parke on Ins., 46; Par. on Mer. L., 494.)

2. The "conditions" relate not merely to the state at the time of the policy, but are a warranty that it shall remain so. (*Westfall v. Hudson R. Ins. Co.*, 2 Duer, 490; *Sillem v. Thornton*, 26 Eng. L. & Eq., 238; Parson on Mer. Law, 499, and note; *Williams v. N. Eng. Mutual*, 31 Maine, 219.)

3. The conditions must be strictly performed, whether the risk be increased or not. (2 Park on Ins., 661.)

4. Proof of usage is not admissible to explain or vary the language, unless it be so general a usage of trade as

The Mayor, &c., of N. Y. v. The Exchange Fire Insurance Company.

necessarily to enter into and form part of the contract. (1 Park on Ins., 46; *Blackett v. Royal Ass. Co.*, 2 O. & J., 244; *Gabay v. Lloyd*, 3 B. & Cr., 793; *Robertson v. French*, 4 East, 134; 2 Greenl. Ev., § 377; *Illinois Mutual v. O'Neile*, 13 Ill., 89; Pars. on Mer. L., 490.)

5. Evidence of a particular use of the building before the policy is not admissible, and is no excuse for a departure from the language of the contract. (*Mead v. N. W. Ins. Co.*, 3 Seld., 534; *Macomber v. Howard Ins. Co.*, 7 Gray, 257; *Illinois Mutual v. O'Neile*, 13 Ill., 89; *State Mutual v. Arthur*, 30 Penn., 315; *Wall v. E. R. Ins. Co.*, 3 Duer, 264.)

Daniel Lord, for the plaintiffs, respondents.

I. The plaintiffs, as owners of the fee of the land, in possession at the time of the insurance and of the fire, had an insurable interest. The building was not a removable fixture, but a part of the realty.

II. The policy described the building as "the iron and glass building known as the Crystal Palace on Reservoir Square; it also covered the furniture and fixtures lately owned by the Association for the Exhibition of the Industry of all Nations;" also, "the property of exhibitors remaining in the said building." This description of a building and its contents, was a description of the purpose of its occupation, as much so as if described as a cabinet-maker's warehouse, or a distillery, or a printing house.

It was also a conspicuous object in a public square of the city in which all parties resided, and which had been continuously a public place of exhibition long before and up to the date of the policy. It was of course insured as a building to be occupied and used for the purpose indicated by the description, and not as a building to be left vacant.

The restriction of the modes of use in the policy on which the defendants place their defense admits the right of use in every way not within the restriction. (*Harper v. Albany M. Ins. Co.*, 17 N. Y. R., 194; *Bryant v. Pough-*

The Mayor, &c., of N. Y. v. The Exchange Fire Insurance Company.

Keepsie M. Ins. Co., 17 N. Y. R., 200; *Delonguemare v. Tradesmen's Ins. Co.*, 2 Hall, 589; appr. 17 N. Y. R., 197; *Harper v. City Fire Ins. Co.*, 22 N. Y. R., 442; *Townsend v. N. W. Ins. Co.*, 18 Id., 168; *Grant v. Howard Ins. Co.*, 5 Hill, 10.)

III. The merchandise, machinery, &c., in the building were all within the use described in the policy, of a place of the public Exhibition of the Industry of all Nations; and they were therefore within the description covered by that of the building insured as a building to be used.

IV. The use and occupation of the building was not "an appropriation, applying or using, for the purpose of carrying on or exercising any trade or vocation specified in any of the classes of proscribed hazards, nor a storing or keeping therein of any of the goods or merchandise proscribed as hazardous."

1. The exhibition, by way of experiment, of machinery, &c., or of articles of industry, was not carrying on or exercising any trade, nor the storing or keeping of merchandise. These latter clauses apply to a substantial business, and not to a mere exhibition. (1 Phil. Ins., 479, pl. 882, 883, and cases there cited; *Hynds v. Schenectady Ins. Co.*, 1 Kern., 561; *O'Neil v. Buffalo Ins. Co.*, 3 Com. R., 122; *Langdon v. N. Y. Ins. Co.*, 1 Hall, 226; 6 Wend., 623.)

2. Exceptions to exempt an insurer are all to be restricted in their construction, the policy being a contract framed by him. (*Anderson v. Fitzgerald*, 4 House of Lords' Cases, 484; 24 Eng. L. and Eq., 1.)

V. There is no evidence that the risk was increased by any means within the control of the insured.

BY THE COURT—BARBOUR, J. The objection of the defendants' counsel to the appearance of Mann & Rodman as attorneys for the plaintiffs in the action, was not well founded. The General Term of this Court has decided, in a similar case, that, although it is made the duty of the counsel to the Corporation, by statute, to bring and

The Mayor, &c., of N. Y. v. The Exchange Fire Insurance Company.

defend their suits, and to perform all their law business, there is nothing in the statute intended or calculated to prohibit the employment of other attorneys or counsel by the city authorities, as was done, with the consent of the Corporation Counsel himself, in this case.

Neither the exception of the defendants to the denial of their motion to dismiss the complaint when the plaintiffs rested, nor their exception to that part of the charge of the Judge, in which he instructed the Jury that the plaintiffs, as the owners of the land upon which the building stood, had an insurable interest to the extent of the value of the building, was well taken. The plaintiffs were the owners in fee of the land upon which the building stood. They were, therefore, the owners of the building, which was a permanent structure, and attached to the freehold and formed a part of it, unless there was something in the lease to the association taking the case out of the general rule, that buildings of that description belong to the realty, which, clearly, there is not. No right to remove the building is reserved or granted to the lessees in the lease; but, on the contrary, the premises, which were of great value, were demised to the lessees at a merely nominal rent, in consideration of which, they, on their part, undertook and covenanted that they would erect thereon a building of a certain description, and that, at the expiration of the term, they would quit and surrender the demised premises, in as good state and condition as reasonable use and wear thereof would permit, damage by the elements excepted. This language imports an intent to surrender the structure which was, by the terms of the lease, to be erected, as well as the land upon which it was to stand. It seems hardly possible to suppose that the parties designed to provide against an injury by use and wear to a block of ground, then wholly vacant, and which, under the lease, was only to be used by placing a building upon it; nor that they intended to except mere land, occupied as this was to be, from damage by the elements.

The Mayor, &c., of N. Y. v. The Exchange Fire Insurance Company.

There is nothing in the case, as presented to the General Term, showing, or tending to show, that the Justice before whom the cause was tried refused or omitted to charge the Jury, in substance, everything that he was requested to charge them by the counsel for the defendants. The case states that the Judge refused to give the instructions to the Jury, as requested, "*except so far as they were embraced in the charge which was, in fact, given;*" and that he charged the Jury, "*among other things,*" certain matters as set forth in the case; but there is no statement showing what those other things, charged by him, were. For aught that appears, therefore, none of the requests were omitted by the Judge; and it follows that the exception, in this regard, cannot be sustained.

The evidence of former insurances upon the property, by the defendants, tended to show, in connection with other facts proved, that the defendants were fully aware, at the time the policy was issued to the plaintiffs, of the general purposes for which the Crystal Palace had been, and then was used; and that they designed to assume a risk of the same character as those covered by the prior policies, in almost the same words. It was, therefore, properly admitted.

There was but one important fact, to be determined by the Jury, upon which there was any doubt; that is, whether the risk was so increased, after the issuing of the policy, as to render the same inoperative. Upon that subject the Judge charged, substantially, that the plaintiffs had a right, after the policy, to occupy and use the building for the same purposes for which it had theretofore been used within the knowledge of the defendants when the risk was taken; but that if it was used otherwise than as a mere place of exhibition, or was so occupied or used as to render the hazard greater at the time of the fire than when the insurance was effected, the plaintiffs were not entitled to recover. The charge, in this regard, was undoubtedly correct.

Fielden *et al.* v. Lahens *et al.*

Upon a careful examination of the entire case and exceptions, we are of opinion that no error was committed upon the trial which authorizes us to disturb the verdict. The judgment must, therefore, be affirmed.

Ordered accordingly.

THOMAS FIELDEN *et al.*, Plaintiffs and Appellants, v.
PIERRE FRANCOIS LAHENS *et al.*, Defendants and Respondents.

1. The common law rule that in an action on a joint contract, against several persons, the plaintiff cannot recover against either, without establishing that the contract sued upon is the joint contract of all, still applies in actions which were commenced before the enactment of the Code of Procedure.
2. The provision of section 274 of the Code of Procedure, altering this rule, does not affect actions commenced before the Code; and section 459 of the Code, as amended in 1851, which makes all its provisions apply to future "proceedings" in actions theretofore commenced, merely prescribes the forms to be observed, and does not modify or repeal any rule of law affecting a defendant's liability or a plaintiff's right to recover.
3. One who receives a note, indorsed in the name of a partnership, knowing at the time that the indorsement was not given for a partnership debt or in the partnership business, but was written by one member of the firm, in a matter not relating to the firm's business, but on the contrary for the accommodation of another person, cannot recover thereon against the other members of the firm.
4. The Court will not reverse a judgment because the Referees, before whom the cause was tried, excluded an offer of further evidence on the part of the plaintiffs, made after the plaintiffs had rested and a nonsuit had been directed, unless the offer of such evidence showed at least the counsel's belief that the evidence, if admitted, would aid the plaintiffs.
5. A deposition is not to be excluded on the ground that the witness was incompetent, by reason of interest, at the time when it was taken, if his oral testimony would be competent by law at the time of the trial, notwithstanding the existence then of the same interest.

(Before BOWWORTH, Ch. J., and MONROE, ROBERTSON, WHITE and MONELL, J. J.)

Heard, May 17.; decided, June 28, 1862.

THIS action was brought by Thomas Fielden, Daniel Campbell and William O. Pickersgill, survivors of Joshua

Fielden et al. v. Lahens et al.

Fielden, John Fielden and James Fielden, composing the firms of W. O. Pickersgill & Co., of New York, and of Fielden Brothers & Co., of Liverpool, England, against Pierre Francois Lahens, Edward Ernest Lahens, and Louis Emile Lahens, survivors of Augustin Edouard Gaudard, composing the firm of J. Lahens and Company, of New York, and of Havre, France, seeking to charge them as indorsers of three promissory notes, all made by one Alexander Caselli, of New York, to the order of J. Lahens & Co., and indorsed in their name, all dated May 25th, 1844. The amount of the three notes was nearly \$49,000. The action was commenced before the enactment of the Code of Procedure; and after issue it was referred for trial to Robert Emmett, George O. Goddard and William Betts, Esqs.

It appeared on the trial that at the time of making the notes, Alexander Caselli, the maker, was a merchant in New York, engaged in purchasing and shipping cotton and other produce to Europe for sale on his account. He had obtained from Mr. Pickersgill, of the plaintiffs' New York firm, large advances, and, as security, had deposited with him a large amount of business paper and bonds. Caselli desiring to obtain these, induced Mr. Pickersgill to return them to him, upon his promise to give him immediately other negotiable paper in lieu thereof, and, in pursuance of this promise, Caselli drew the notes in suit, and procured Louis Emile Lahens, (who was the only member of defendants' firm resident in this country,) to indorse these notes in his firm name, and these notes, so indorsed, Caselli delivered to Pickersgill in exchange for the business paper and other securities referred to. Lahens being examined as a witness at the trial, testified that Caselli applied to him to indorse the notes, saying that he had received notices of sale of produce abroad, but not the regular accounts; that Mr. Pickersgill agreed to advance the amount appearing due if he, Caselli, would give security that his statement was correct, and that he wished to give these notes in exchange for other securities already

Fielden *et al.* v. Lahens *et al.*

given for this purpose, and "being convinced of Mr. Caselli's accuracy, and, out of friendship to him, he agreed to indorse said notes, with the express understanding that said notes should be delivered to Messrs. Pickersgill & Co. in behalf of Fielden, Bros. & Co., of Liverpool, and remain in Pickersgill & Co.'s hands, for no other purpose than they should be security that the account or statement should be correct.

Caselli, on remitting the notes to Mr. Pickersgill, stated in one of his letters: "In order to please you, I have left my desk and procured the signature of J. Lahens & Co. to the two notes herein inclosed." In another he said: "I now beg to remit you my note, indorsed by Messrs. J. Lahens & Co., for balance of securities. I would have sent it to you yesterday, had not these gentlemen been too much engaged to attend to my own matters."

The Referees decided that Louis Emile Lahens alone could be held liable on the indorsement; but that the other members of the firm having been joined with him as defendants, the plaintiffs could not recover in this action against any of the defendants, and they directed a nonsuit. The plaintiffs' counsel then called Louis Emile Lahens as a witness to produce the articles of partnership between the defendants; and being required to state what he expected or intended to prove by the witness, the counsel stated: "We intend to prove what was the authority conferred on Louis Emile Lahens by his copartners, as a member of the firm of J. Lahens & Co., we ourselves not knowing what that authority was."

The Referees deemed the statement indefinite and insufficient, and excluded the evidence.

In the course of the trial, the defendants' counsel offered in evidence a deposition of Mr. Caselli, taken *de bene esse*, in the year 1845, to the admission of which the plaintiffs' counsel excepted on the ground that, by reason of his interest in the suit, he was incompetent as a witness when the deposition was taken.

Jeremiah Larocque, for appellants.

I. Conceding for the present, for the sake of the argument, that the plaintiffs could not recover against Pierre F. and Edouard E. Lahens, the deduction of the majority of the Referees as a consequence, that the plaintiffs must fail against Louis E. Lahens, was manifestly erroneous under the authorities, the point being *res adjudicata* by the decisions of the General Term of this Court as well as of the Court of Appeals. (Code, § 136, subd. 3; § 169; § 274; § 459, subd. 2; *Clafin v. Butterly*, 5 Duer, 327; *McKensie v. Farrell*, 4 Bosworth, 192; *Brumskill v. James*, 1 Kernan, 294; *Marquat v. Marquat*, 2 Kernan, 336; *Pruyn v. Black*, 21 N. Y. R., 300.)

II. Section 459 of the Code, both in letter and in spirit, brings this case, commenced before the Code was adopted, within its operation. (Code, § 459, subd. 2; *Dunham v. Watkins*, 2 Kernan, 556; *Fellows v. Emperor*, 13 Barb., 92; *Davis v. Smith*, 14 How. Pr., 187; *Reynolds v. Davis*, 5 Duer, 611; *Fitch v. Livingston*, 4 Sandf., 712.)

III. The articles of copartnership of the defendants, and the evidence of L. E. Lahens offered in connection with them, were competent for the plaintiffs on the question of the authority of Louis E. Lahens to bind his copartners by the indorsements in question, and were improperly excluded. They were excluded because the plaintiffs' counsel could not state "on his honor" whether they would make for or against him. In other words, he could not tell whether the answer of a witness to a pertinent question would be favorable or unfavorable to his clients. The rule applied is believed to be a novel one in reference to the admission or exclusion of testimony.

IV. The deposition of Alexander Caselli under the commission was improperly received by the Referees, and the exception on that account was well taken. He was incompetent from interest when he was "*offered as a witness*," by being examined under the commission, (February 20, 1845,) and the case is therefore not helped by the Code. He was incompetent, because the defendants were his

Fielden et al. v. Lahens et al.

accommodation indorsers, and he, having notice of the suit by being examined as a witness, was liable to them for their costs and expenses, in addition to the amount of the recovery which might be had against them on the notes, and his interest, therefore, was not balanced. (Code, § 398; *Hubbly v. Brown*, 16 Johns., 70; *Tilden v. Gardiner*, 25 Wend., 663; *Bowne v. Hyde*, 6 Barb., 392; 1 Greenleaf's Ev., 401; 2 Id., 218, and cases.)

V. The defendants, Pierre F. and Edouard E. Lahens, are not absolved from liability under the indorsement of their firm name, by their copartner, Louis E. Lahens, on the ground that the indorsements were made for the accommodation of Caselli, and for that reason beyond the scope of their partner to bind them. Upon the evidence, it is not to be presumed that Mr. Pickersgill had notice as to the circumstances attending the making and negotiation of the indorsements.

Charles O'Conor, for respondents.

I. The defense of the absent brothers Lahens is based on the familiar rule that a partner has no more authority than a mere stranger to execute such bills, &c., in his own business, or for the accommodation of others, and in such cases the instrument, as against the firm, "is void in the hands of any party having knowledge of the consideration for which it is given." (*Farmers' Bank of Kent v. Butchers' and Drovers' Bank*, 16 N. Y. R., 135, per SELDEN J.; *N. Y. Fire Ins. Co. v. Bennett*, 5 Conn. R., 580.)

II. The form of the security taken by the plaintiffs was full and express notice to the plaintiffs that the signature of Lahens & Co. was placed thereon by one member of the firm, by way of, and as a guaranty of the obligation to pay entered into by Caselli. (*Foot v. Sabie*, 19 Johns., 156; *Loverty v. Burr*, 1 Wend., 529, in point; *Stall v. Catskill Bank*, 18 Wend., 478, per WALWORTH; *Bank of Vergennes v. Cameron*, 7 Barb., 150.)

1. Indorsing as surety for another, is not a legitimate

or regular branch of banking business. (*Bank of Genesee v. Patchin Bank*, 3 Kern., 316, 321.)

2. The attempt to connect the firm of Lahens & Co. with the consideration moving between Caselli and Pickersgill, by force of any inferences deducible from the fact that some of the business notes given up to Caselli by Pickersgill bear the indorsement of Lahens & Co., is not consistent with any legal view of the evidence, and is well refuted by *Lavery v. Burr*, (1 Wend., 529, above.)

III. It was the duty of the Referees to dismiss the complaint as to these defendants. (*Carpenter v. Smith*, 10 Barb., 664, and cases there cited; *People v. Cook*, 4 Seld., 74, 75.)

IV. The plaintiffs' several exceptions are not well taken.

V. Whether the judgment was erroneous or not as to the defendant Louis Emile Lahens, it ought to be affirmed as to the defendants Pierre F. and Edouard Ernest Lahens. (Code, § 330; *Montgomery Co. Bank v. Albany City Bank*, 3 Seld., 459; *Giraud v. Stagg*, 4 E. D. Smith, 27; *Ogden v. Gardner*, 22 N. Y. R., 327.)

BY THE COURT—BOSWORTH, Ch. J. L. An important question presented by this appeal is, whether in an action on contract, commenced before the enactment of the Code against several persons as partners, the plaintiff can recover against either, without establishing a cause of action against all.

It was settled before the Code, that in such an action if the evidence disclosed that there were too many, or too few, plaintiffs, or too many defendants, a nonsuit was inevitable.

The codifiers, in their note to section 230, (now 274,) state the existence of this rule, and the consequences arising from the nonjoinder or misjoinder of parties, and that "this section will prevent them hereafter." (Codifier's Report of February 29, 1848, p. 194.)

Having proposed this section for the purpose of accomplishing this object, (among others,) and the Legislature

Fielden et al. v. Lahens et al.

having enacted it in the form proposed, with this explanation of its design before them, that body must be presumed to have enacted it for the purpose of giving effect to this intent. The language of the section is appropriate to produce the change proposed to be effected by it.

These considerations are sufficient to show that it was never contemplated that § 169 [145] would be construed as sufficient to produce the same result; and that it was not enacted with a view to make such a result possible. The codifiers, after having drafted that section, and appended to it a note explanatory of its design, drew § 274, [230,] and by a note added to it state that the latter section was proposed as drawn, to obviate the unjust consequences imputed to the common law rule as to parties, to which that note refers.

Section 8 of the Code declares that part two of the Code (in which these sections are found) "relates to civil actions commenced in the courts of this State after the 1st day of July, 1848, except when otherwise provided therein."

An act was passed contemporaneously with the Code, (April 12, 1848,) entitled "An act to facilitate the determination of existing suits in courts of this State." (Laws of 1848, p. 566.) That act applied to existing suits sections 145 to 151 inclusive, (now 169 to 176 inclusive,) but did not apply section 230, (now 274.)

When this act, and the Code, were amended in 1849, the same condition of things was continued. (Laws of 1849, p. 705.) There can be no pretense that the law has been changed in this respect, unless it has been effected by § 459 of the Code, as amended in 1851. It must, therefore, be conceded, that up to 1851 the Code had not only not attempted to modify the common law rule as to parties in suits commenced prior to its enactment, but, on the contrary, it expressly provided that the very section which was enacted to abrogate it as to suits to be commenced subsequently, should not apply to existing suits.

There would seem to be good reason for not applying it

to existing suits. The enactment of a law, pending a suit, which should deprive a defendant of a perfect defense to the action and of the costs consequent upon establishing it, and enable a plaintiff to recover damages, and not only absolve him from a liability to pay costs to all the defendants, but confer a right to recover costs from some of them, would be extraordinary legislation; and it was evidently the design, that a plaintiff who had a suit pending at the time the Code took effect, in which, by the settled rules of the common law, he could not recover, although it might be for the reason he had sued too many persons as defendants, should be controlled to the conclusion of the litigation by the rules regulating the right to recover at all, which were in force at the time when his suit was brought.

I do not find that chap. 380, of the Laws of 1848, as amended by chap. 439, of the Laws of 1849, has been repealed.

Section 459 of the Code, as amended in 1851, should be construed in the light of this legislation, and in harmony with the policy and provisions of chap. 380, Laws of 1848, and chap. 439, Laws of 1849, unless by the obvious meaning of its terms, it repeals the last named act. That act is not, by any statute, in terms, repealed; and if repealed, it is by force of a construction to be given to § 459 of the Code.

That section, by enacting that "the provisions of this act (the Code) apply to future *proceedings* in actions or suits heretofore commenced and now pending * * where there is an issue of law or fact, or any other question of fact to be tried, to the trial and all subsequent proceedings," merely prescribes the forms to be observed, and does not modify or repeal any rule of law affecting a defendant's liability in the action, or a plaintiff's right to recover in it.

In *Rich v. Husson*, (1 Duer, 617, 620, 621,) the meaning of the word "proceeding," as used in this section, was a matter of consideration and comment, and it was construed

as corresponding with "modal." The Court say: "It means, in all cases, the performance of an act, and is wholly distinct from any consideration of an abstract right. A proceeding in a civil action is an act necessary to be done in order to attain a given end. It is a prescribed mode of action for carrying into effect a legal right."

The first subdivision of section 439 requires "the pleadings and all subsequent proceedings," where there has been no pleading, to be in the form prescribed for suits brought under the Code; the second applies the forms of the Code "to the trial and all subsequent proceedings;" and the third, its forms of proceedings, "to enforce, vacate, modify or reverse" a judgment or order.

The object of this section, which by amendment received its present form nearly three years after the Code took effect, was to prescribe in regard to all steps that might be taken subsequently in existing suits, that they should be in the form provided by the Code. From that time forward, all proceedings then subsequent, whether in suits commenced before or after the Code was passed, were to be the same in form, as if the suits were brought under the Code.

In this view of the law, the Referee did not err, in holding that the plaintiffs could not recover against either defendant, as they had failed to prove a joint liability of all.

No case has been cited, which holds that in an action commenced prior to the Code, against several, as joint contractors, the plaintiff can recover against some of them, without so far establishing a right to recover against all as consists in proof that the contract sued upon is the joint contract of all. In such a case, a plaintiff could recover, though one or more of the defendants might establish a defense merely personal, as infancy, or the like; but he was compelled to establish that it was, in fact, the joint contract of all, and failing to do this, he could not recover against either.

Fielden et al. v. Lahens et al.

II. The plaintiffs, at the time they received the notes in question, received them from A. Caselli, the maker, and knew that the indorsements were not given for a partnership debt, or in the partnership's business, and that they were written by one of the firm in a matter not relating to the firm's business, but, on the contrary, to accommodate the makers. (*Laverty v. Burr*, 1 Wend., 529; *Stall v. Catskill Bank*, 18 Wend., 478; *Foot v. Sabin*, 19 Johns., 156; *Boyd v. Plum*, 7 Wend., 309; *Joyce v. Williams*, 14 Wend., 141; *Wilson v. Williams*, 14 Wend., 158.)

If the Referees had found the fact which the appellants' counsel insists they might have found upon the evidence, viz.: that the business paper delivered by Pickersgill to Caselli, on the 23d of May, was intrusted to the latter, under an agreement to the effect that Pickersgill was to receive in exchange for it other good business paper to the amount of \$27,500, and J. Lahens & Co.'s two notes, with Caselli's indorsements, for \$27,500 more; even then, no liability as against any defendant other than Emile Louis Lahens, would have been established. The insurmountable difficulty would still remain, that the consent of his partners to the transaction is not proved, and no evidence is furnished of any grant of authority to him to pledge the firm's name in matters not in any manner relating to its business.

All exceptions taken to the admission or exclusion of evidence directed to establish the fact that, as between Pickersgill and Caselli, the consideration for the reception of the indorsements was such as, it is insisted on behalf of the appellants, the evidence tends to show it was, are unimportant; the fact remains that the indorsements are not the indorsements of the firm; that they have no connection with its business, and were made without the authority or consent of the members of the firm other than of the one who wrote them, and all this Mr. Pickersgill knew when he took them.

III. The exception to the exclusion of the defendants' articles of copartnership is untenable. The articles were

DeLafield v. Holbrook et al.

offered after the plaintiffs had rested and the Referees had announced their conclusion to nonsuit the plaintiffs. It was discretionary with the Referees to admit further evidence, and it certainly was not error to exclude proffered evidence when the plaintiffs' counsel would not state his belief that it would tend to show any authority in Emile Louis Lahens to make the indorsements in question. As the case is made up, the Court cannot see or conjecture that, if admitted, it would have aided the plaintiffs, and therefore cannot see that they have been prejudiced by its rejection.

IV. The fact that the defendants are accomodation indorsers of A. Caselli, and that he is therefore interested in the event of the suit, did not affect his competency as a witness at the time his deposition was read in evidence. Had he been examined orally at the trial as to the same matters, he would have testified under precisely the very interest that existed when he was examined under the commission; and the fact that he testified under the bias which the existing interest may have created, did not affect the competency of his testimony when offered. (And see 3 Phil. on Ev., Cowen & Hill's and Edwards' Notes, 120.)

If the deposition of A. Caselli, taken under the commission, be rejected and stricken from the case, there could not, even then, by any probability, be a recovery by the plaintiffs; there would be a total absence of evidence tending to show a joint liability of all the defendants.

The judgment should be affirmed.

**HENRY DELAFIELD, Plaintiff, v. WILLIAM R. HOLBROOK
et al., Defendants.**

The following agreement "For value received, I hereby guaranty to A, that the bond of," &c., "shall be of the value of," &c., "on," &c., "at which price and at which date I will purchase the same if offered to me," contains both a contract of guaranty, and a contract of purchase; and it

Delafield v. Holbrook et al.

gives A. his option to recover on the guaranty, retaining the bond, or to recover as on a sale of the bond upon delivering it up. (BARBOUR J. dissented.)

(Before ROBERTSON, WHITE and BARBOUR, J. J.)

Heard, June 12; decided, July 31, 1862.

MOTION for judgment upon a verdict taken subject to the opinion of the Court at General Term.

This action was brought against William R. Holbrook and Elizabeth J. Holbrook, executors of the will of D. B. Holbrook, deceased, upon the following instrument in writing:

"For value received, I hereby guaranty to H. and W. Delafield that the bond of The Newfoundland Electric Telegraph Company, No. 19, for two hundred pounds sterling, shall be of the value of nine hundred and sixty dollars, on the 7th day of March, 1855, at which price, and at which date, I will purchase the same if offered to me. New York, March 8, 1853.

D. B. HOLBROOK."

Upon the trial, it was proved by the plaintiff that the bond was of no value on the 7th of March, 1855; but there was no evidence that such bond was, upon that date, or at any time prior to the death of Holbrook, which subsequently occurred, offered to him to purchase. The defendant, thereupon, moved to dismiss the complaint, upon the ground,—*first*, that the guaranty expresses no legal consideration; and, *secondly*, that there was no proof that the bond was ever offered to Holbrook. The motion was refused, and verdict rendered for the plaintiff for the amount claimed, viz. \$960, and interest from March 7, 1855, subject to the opinion of the General Term.

L. L. Delafield, for plaintiff.

I. This agreement may be regarded either as a contract of guaranty, or as a contract of purchase and sale, at the option of the plaintiff.

II. It cannot be held to be an entire contract without disregarding the rules of construction. As an entire contract, it is impossible to give effect to more than one-half

Deafield v. Holbrook et al.

of the agreement; it is then either a guaranty only, or an agreement of sale only.

And there is more reason in plaintiff's insisting that it is a guaranty only, than in defendants' claiming that it is a sale only, because when clauses are repugnant and incompatible, the earlier prevails. (2 Parsons on Cont., 26.)

If the contract be entire, and is to be construed as an agreement of sale, the whole of the first portion is disregarded.

But Courts will, when possible, give effect to all the parts and words of contracts. (*Miller v. Cook*, 23 N. Y. R., 495; *Howard v. Holbrook*.*)

III. The plaintiff, having the option, has elected to treat this agreement as a guaranty. It was therefore unnecessary that he should offer any proof that the bond was offered to Holbrook to be purchased.

IV. This agreement, when construed as a guaranty, is perfectly valid and binding. (*Miller v. Cook*, 23 N. Y. R., 495.)

V. This instrument cannot be regarded as a wager contract. But if the Court should be of the opinion that it is, and that on such a wager the defendants are not liable, a new trial should be ordered, to allow the introduction of evidence of the *res geste* of the transaction, and of the consideration for the agreement, so as to negative such intent.

VI. If, however, this agreement be a wager, it is not an unlawful one, and an action will lie on it.

1. The statute concerning stock jobbing is the only one that can apply to this case, and it, (2 R. S., 116, § 7, 4th ed.,) has been repealed. (Laws 1858, p. 251.)

This repeal repealed the consequences of the statute as to contracts entered into while it was in force. (*Central Bank v. Empire Stone Dressing Co.*, 26 Barb., 33; *Washburn v. Franklin*, 13 Abbotts' Pr. R., 140.)

2. Wagers on the future market price of foreign stocks were not, at common law, and are not now, illegal. (*Chitty*

* Reported ante, 237.

Delafield v. Holbrook et al.

on Contracts, 5th Am. ed., 1842, 496; *Morgan v. Pebrer*, 2 Bing. N. C., 457; *Wells v. Porter*, Id., 722; *Oakley v. Rigby*, Id., 732; *Elsworth v. Cole*, 2 M. & W., 31; 3 Stephens N. P., 2739, Tit. Wagers.)

R. Goodman, for defendants.

I. The manifest intention of the parties was, that the bond should be offered to the guarantor at the time named in the guaranty, and that he should then have the privilege of purchasing it.

This intention is always the paramount rule for the interpretation of every contract.

II. Offering the bond to the guarantor at the time specified, was a condition precedent. (*Antrobus v. Davidson*, 3 Meriv., 569; *Samuel v. Howarth*, Id., 272, &c.; *Elworthy v. Maunder*, 2 Moody & P., 482; *Pearse v. Morrice*, 2 Adolph. & El., 84; *Muskett v. Rogers*, 5 Bing. N. C., 728; *Hunt v. Smith*, 17 Wend., 179.)

III. The option accorded to the guarantor was for his benefit, and was equivalent to a demand being required upon him before the bond could be sold for less than its nominal amount, or he in anywise made liable. (*Alcock v. Blowfield*, Noy, 95; *Russell v. Buck*, 11 Vermont R., 166; *Payne v. Ives*, 3 Dowl. & Ryl., 664; Theobald on Prin. and Surety, 139; *Howard v. Holbrook*.*)

BY THE COURT—ROBERTSON, J. In the recent case, decided at a General Term of this Court, (*Howard v. Holbrook*, ante, 237,) I had occasion to consider a precisely similar agreement as that now before the Court, and to say that the plaintiff had his option between the contract of guaranty and that of sale; assuming that there could be no controversy that there were two such contracts in the instrument in question. A still further examination and consideration have not shaken my views then expressed.

A contract to guaranty the value of an article, and one to purchase it, arise from the use of different words, and

* Reported ante, 237.

Delafield v. Holbrook *et al.*

lead to different results and obligations. The first requiring a consideration to support it, and the second being supported by the mutual agreement to buy and sell. No one could have the slightest doubt that if this instrument had ended with the date of March 7, 1855, it contained as complete a contract of guaranty as could have been drawn. The words "for value received," expressed the consideration, and implied something more than the future payment of the expected value; "*guaranty that the value shall be,*" is peculiarly expressive of such an undertaking, and does not approach in any way the language of an undertaking to purchase. The question remains, whether the addition of the words, "*at which price and at which date I will purchase the same if offered to me,*" change the whole contract to one merely of purchase, upon condition of a tender.

There is no inconsistency between the two clauses of this instrument, no indication that the second was meant to qualify the first, and no necessity of reconciling any conflicting meanings. There is no impossibility, arising from grammatical rules, of these containing two distinct obligations. Instead of the relative pronoun "which," the parties might have employed a conjunction, and the demonstrative pronoun "that," so as to have read, "and "I will purchase the same if offered to me at that time and at that price." Relative pronouns have precisely that effect. The sentence does not remain the less double, because of their use; it contains two undertakings,— "I hereby guaranty the value," and "I will purchase," whether there be one sentence or two. A deed, by which A. conveyed to B. certain premises, the title to which A. warranted, would not the less operate as a conveyance, because it contained the warranty which referred to the premises by a relative pronoun. There is no more authority for making the agreement to purchase predominate over and absorb the contract of guaranty, than for making the latter, which comes first, control the former. The "value received" was stated to be for the guaranty

and not for the agreement to purchase. If the order had been inverted, placing the contract for purchase first, so as to have read : "I will buy such a bond at such a price, on "such a day, if offered to me, *whose value I guaranty shall "be such price,"* would the last part be rejected as surplusage? Did any one ever before draw a simple agreement to buy in the form in which this instrument is drawn, placing the main idea last, and thrusting in a guaranty before it? I cannot doubt that the legal effect of every word of the instrument expressed the intention of the parties, and was necessary to do so.

Interpreted as a double agreement, the object is very plain. It is not to be assumed that the defendants' testator believed or expected the bond mentioned would be entirely worthless; he wished the plaintiff to retain it in his possession for two years, he, therefore, guaranteed that the value should be a certain sum at the end of that time; this, however, would give the plaintiff the right to recover only the difference between the actual and named value, on retaining the bond; but he intended to give the plaintiff the option to recover the whole of the sum named, on giving up the bond if he preferred it. A mere agreement to sell and buy would deprive the plaintiff of the right of retaining the bond, being indemnified against loss; besides, such an agreement would require the plaintiff to tender on the day, (see *Howard v. Holbrook, ubi sup.*) which he might not be able to do; whereby the defendants' testator would escape all liability; whereas, the liability on a contract of guaranty would be fixed on the day named, and could not be increased or diminished afterwards.

I do not consider it very hard, that the plaintiff should retain the bond on being paid its inferiority of value to the sum named; what the value received was, that induced the defendants' testator to agree thereto does not appear; he may have sold the bond to the plaintiff at the price at which he agreed to take it back, and in such case he ran the risk of its falling in value instead of the plaintiff; it is sufficient that the defendants' testator, agreed that the

Delafield v. Holbrook *et al.*

plaintiff might so retain such bond receiving the difference of its value.

I am of opinion, therefore, the plaintiff should retain his verdict for the amount which has been given in his favor and have judgment for that amount with costs.

BARBOUR, J., (dissenting.) The words "for value received," in an instrument of this kind, undoubtedly express a sufficient consideration to support it. (*Howard v. Holbrook, ante*, 237.) The sole question for consideration, therefore, is, whether the offer of the note to Holbrook, for purchase, at the time in that regard mentioned in the contract, was a condition precedent to a recovery under the guaranty.

The counsel for the plaintiff claims that two distinct and several undertakings, on the part of the obligor, are embraced in the contract in this case; one being purely a warranty that the bond shall be worth \$960 upon a certain day, and the other an undertaking by Holbrook that on the day designated he will buy it for that sum, if offered to him; and that the defendants had a right either to present the bond and require Holbrook to purchase it, or to proceed against him, upon the guaranty, without such presentation. Upon an examination, however, it will be found that the contract signed by Holbrook consists of one continuous sentence not susceptible of a division; and it appears to me to contain but a single proposition or undertaking, to wit: a guaranty on the part of Holbrook that the bond shall be worth \$960 to the plaintiff and his then partner, at the end of two years from that date, which undertaking he agreed to perform so as to render the same effective in a particular manner; that is, by purchasing the bond if presented to him for that purpose on the day mentioned in the agreement, and paying therefor the amount he had covenanted it should then be worth. This construction, I think, is perfectly consistent with the probable design and intention of both parties. The obligors clearly desired nothing further than to receive

Coghlan v. Dinamore.

\$960 for their bond ; for that is all they would be entitled to under either construction. The mere guaranty secured to them that, and the provision for the purchase of the instrument was therefore worthless to them. But it is quite reasonable to suppose that Holbrook designed, at the time he signed the guaranty, to provide for his own safety against loss, by selling the bond to some one else, conditionally, during the two years which were to elapse before he was to pay for it, or that he hoped to realize a profit from the sale of the bond at some future time, in case he should be compelled to purchase it ; and it is difficult to believe that the parties designed to permit the obligees to deprive him of this very equitable right at their option, by retaining the bond in their own hands after they had received from him its full value. I am of opinion, therefore, that the contract signed by Holbrook must be considered as simply an agreement to purchase the bond at the price fixed, provided it should be presented to him for that purpose on the 7th of March, 1855 ; and that such presentation was necessary to entitle the plaintiff to recover against Holbrook or his personal representatives upon the contract.

In this view of the case, it is unnecessary to consider what would have been the duty of the plaintiff as obligee in a mere covenant of guaranty.

The verdict should, therefore, be set aside as contrary to evidence, and a new trial granted, with costs and costs of appeal.

Judgment for the plaintiff on the verdict.

FRANCIS S. COGHLAN, Plaintiff and Respondent, v. WILLIAM B. DINSMORE, President of the Adams Express Company, Defendant and Appellant.

I. In an action against bankers or collecting agents, to recover damages for their neglect to present a note intrusted to them for collection or give notice of non-payment to the indorsers, the burden of proof is on the

Coghlan v. Dinsmore.

defendants to show the insolvency of the indorsers, if they rely on that fact as a defense.

2. Whether the burden of proof is upon the plaintiff to show the insolvency of the maker? *Query.*
3. In such an action it appeared that before the maturity of the note, the maker, who was indebted to the indorsers, paid them a part of the amount of the note, upon their promise to pay the note at maturity and give him further credit, and this transaction was unknown to the other parties.

Held, that this payment was not available as a defense, *pro tanto*, in favor of the collecting agents, it not being a payment for the use or benefit of the holder of the note.

Held, further, that the payment and promise having been unknown to the holder of the note until after the commencement of his action against the collecting agents, such facts did not amount to a waiver, on the part of the indorsers, of demand and notice of non-payment, which would exonerate the defendant from any consequences of their neglect to make such demand and give such notice.

4. *It seems* that an indorser of a note, who, being informed by the maker that he will be unable to pay the note, receives from him, without the holder's knowledge, a part of the amount of the note, promising to pay the note at maturity and give the maker further time, does not thereby waive demand and notice of non-payment.

(Before ROBERTSON, WHITE and BARBOUR, J. J.)

Heard, June 11; decided, October 6, 1862.

THIS was an action for damages for failing to take proper steps to charge the parties to a note left with the defendants for collection.

The note was dated the 17th of June, 1860, and was for \$1,922.34, drawn by G. W. Nichols, payable ten months after its date, to the order of Saltus & Co., at the office of Payne & Harrison of New Orleans, with current rate of exchange on New York at maturity. It was indorsed by Saltus & Co., and also by Mrs. Anna Saltus.

The defendants signed a receipt, dated the 6th of April, 1861, of such note from the plaintiff for collection, proceeds to be returned with exchange on New York, in which it was expressed that if not honored, it "was to be returned, and "all charges for *protest*, express service, &c., to be paid by the consignor." The note was afterwards returned unprotested and the plaintiff refused to receive it, no notice having been given to the indorsers.

The complaint alleged the defendants to be a joint stock

company, doing business as collection agents, set out the ownership of the note in question by the plaintiff, its making by Nichols, and the indorsements, and the undertaking by the defendants to collect the note or charge the parties thereto, and their failure to perform it, by not protesting the note, and omitting to notify the indorsers. The answer denied every allegation in the complaint, except the making and indorsement of the note in question, and averred that the maker paid the plaintiff, after the maturity thereof, on account of such note \$1,000, in consideration whereof the plaintiff had agreed to extend the time for the payment of the residue, for a definite period, and thereby discharged the indorsers.

On the trial the defendant read in evidence a complaint in an action brought by the present plaintiff against the indorsers of such note, which was only signed by the plaintiff's attorneys, and not signed or verified by the plaintiff, in which it was alleged that the maker of such note deposited with Saltus & Co., the indorsers of it, \$1,000, to be applied on such note when it became due, and the defendants in that suit had notice that it would not then be otherwise paid, and the then defendants, Saltus & Co., agreed, for themselves and Mrs. Saltus, of whom they were agents, to apply such money on such account; and it was also further alleged that such note was duly presented and notice of non-payment given to the indorsers. Such action was pending at the time of the trial of this action.

The maker of the note, (Nichols,) testified that on the 12th of April, 1861, he wrote a letter to Saltus & Co., in which he stated "that he would send them a draft for \$1,000 *if they would protect the note*, and give him twelve months" in which to pay the residue. The letter itself was not produced, having been mislaid. Saltus & Co. sent an answer to such letter, to the maker, in which they stated that the letter of the 12th was received, and requested him to send them by return mail his draft on his bankers in New Orleans, at one day's sight, for \$1,000, advising them of the same; and if they had no funds there,

Coghlan v. Dinsmore.

a draft for the same amount on his house in Shreveport, and at the foot was written : " If possible by return mail." Nichols further testified that he gave Saltus & Co. the \$1,000, and they agreed to relieve him from that note and give him credit for the balance for twelve months, and he notified them it was impossible for him to pay it at maturity. On cross-examination he admitted that Saltus & Co. held other notes of his at that time. He also stated that it was understood that Saltus & Co. should take up the note ; their agreement was that they would protect it ; and being a second time cross-examined, he stated that it was understood between them that the note would have to be protested. He further testified that, at the time this note matured, he was not able to provide for it ; and on the 12th of April he understood it had gone forward and could not be prevented from being protested. Theodore Saltus, one of the firm of Saltus & Co., being examined as a witness, testified that the \$1,000 was received on account of the debts owing them by Nichols.

The maker of the note, (Nichols,) also stated the condition of his affairs. He did not think a forced sale of his property at the north would pay his debts, although it might. He did not consider himself insolvent. He owed \$7,200 for merchandise and \$9,000 for mortgages on houses, and the estimated value of his property was \$20,000 to \$25,000. When the political troubles broke out, he had merchandise amounting to \$20,000 in Texas, which had been confiscated by the Rebel Government, and he also had a rental of \$6,000 a year in Shreveport and Texas. He had not attempted to sell his real estate here ; his creditors had agreed to advance him money to finish certain houses he was building, and it was agreed that the rents should be applied to extinguish his debts. He expected to get his property south. He never had the means to pay this note in money.

Mrs. Anna Saltus testified that she supposed Saltus & Co. to be solvent at the time and still supposed so, which testimony was objected to by the defendant.

A motion was made for a nonsuit, upon the ground of want of proof of non-presentment for payment, and of non-notification of the indorsers, which was refused. Another motion was made for leave to amend the answer, by setting up a special agreement between the indorsers and maker of the note in question, to the effect that the indorsers would protect the note at maturity, thereby waiving notice and demand, which was refused; but the Court permitted the defendants to give evidence of waiver of notice of non-payment and protest.

At the conclusion of the trial, the Court charged that there was no proof of such waiver of notice of protest by the indorsers as, between the plaintiff and defendant, would discharge the defendants from performing their agreement to protest the note in question, to which the defendant excepted. The counsel for the defendant then requested the Court to charge that the plaintiff could not recover unless the Jury should believe, from the evidence, that the maker of the note was insolvent, which was refused and an exception taken. The Court then directed a verdict for the plaintiff for the amount claimed, for which judgment was entered, and an appeal taken therefrom. No motion was made for a new trial.

C. A. Seward, for defendant, appellant.

I. The primary inquiries are:

1. What was the contract between the parties?
2. What are the plaintiff's rights, if such contract was not performed?

1. The contract was "a mere contract of agency, which left the plaintiff all his rights and remedies for the recovery of his debt as against other parties, and only rendered the agent liable for the actual or probable damages which his principal sustained in consequence of the negligence of the agent." (*Allen v. Suydam*, 20 Wend., 327.)

2. Assuming that the contract was not performed, what are the actual or probable damages which the plaintiff has

Coghlan v. Dinsmore.

sustained? This must be decided by the light of conceded analogies, and the force of positive precedent.

To entitle the plaintiff to recover against the defendant, he must prove, as elements of damage, first, the insolvency of the maker of the note, and, second, the solvency of the indorsers; and such proof must be submitted to the Jury. (*Russell v. Palmer*, 2 Wils., 325; *Arnold v. Commonwealth*, 8 B. Monr., 109; *Clark v. Smith*, 10 Conn. R., 1; *Varril v. Heald*, 2 Greenl., 91; *Wolcott v. Gray*, Brayton's R., 91; *Potter v. Lansing*, 1 Johns., 215; *Van Wart v. Wooley*, 5 Dowl. & Ryl., 374; *Allen v. Suydam*, 20 Wend., 327; *Warren Bank v. Parker*, 8 Gray, 222; *Bank of Utica v. McKinster*, 11 Wend., 473; *Smedes v. Bank of Utica*, 20 Johns., 372; *Mechanics' Bank v. Merchants' Bank*, 6 Metc., 13; *East River Bank v. Gedney*, 4 E. D. Smith, 582; *Stowe v. Bank of Cape Fear*, 3 Dev., 408.)

Upon the evidence, Nichols, the maker of the note, was solvent and able to pay it.

II. The Court erred in deciding that the evidence on the part of the defendant did not amount to proof of waiver of notice of non-payment and notice of protest by Saltus & Co., the first indorsers of the note, and was not sufficient to discharge the Company from the performance of its agreement.

The neglect to give notice of protest, was justified, in this case, by the acts of the indorser. (Citing and commenting on *Phipson v. Kneller*, 1 Starkie, 116; *Bond v. Farnham*, 5 Mass. R., 170; *Mechanics' Bank v. Griswold*, 7 Wend., 165; *Coddington v. Davis*, 3 Denio, 16; *Taylor v. French*, 4 E. D. Smith, 458; *Seacord v. Miller*, 3 Kern., 58; *Burke v. McKay*, 2 How. U. S. R., 66; *Ilseley v. Jewett*, 3 Metcalf, 434; *Marshall v. Mitchell*, 35 Maine, [5 Red.,] 221; *Boyd v. Cleveland*, 4 Pick., 525; *Mechanics' Bank v. Griswold*, 7 Wend., 168.)

III. It is immaterial whether Anna Saltus was charged as an indorser; because,

1. As between her and Saltus & Co., the note was to be paid by them; and,

Coghlan v. Dinsmore.

2. The plaintiff, having a remedy against the maker and the first indorsers, cannot be said to have been injured by a failure to charge the other indorser.

IV. The motion for a nonsuit was improperly denied.

There is no proof in the case that demand of the note was not made and notice of its non-payment not given. On the contrary, there is proof in the case that payment of the note was duly demanded and that notice of its non-payment was duly given to its indorsers. Those facts are averred in the complaint in the suit brought by the plaintiff against the indorsers, and there is no evidence contradicting them.

Even if Nichols was insolvent, and even if the agreement between him and Saltus & Co. did not amount to a waiver of demand and notice, still the decision of the Court that the evidence adduced by the defendant did not discharge the Express Company from the performance of its agreement, was erroneous; because, the decision fastened upon the defendant a liability to the full amount of the face of the note, when the proof showed that the extent of the plaintiff's loss was only the difference between the amount of the note and the \$1,000 paid thereon by Nichols to Saltus & Co.

The extent of the plaintiff's loss is the measure of the liability of the defendant; and the \$1,000 paid by Nichols, belonged, of right, to the plaintiff, and should have been held by the Court as diminishing *pro tanto* the liability of the defendant.

. *William Allen Butler*, for plaintiff, respondent.

I. The motion for a nonsuit at the close of the plaintiff's evidence, was properly denied.

The burden of proof was on the defendants to show that the note had been protested.

The averment of the complaint in the suit brought in the name of plaintiff against Saltus & Co., and Anna Saltus, as indorsers, that the note had been protested, &c., is immaterial. The complaint, being unverified, was the

Coghlan v. Dinamore.

act of the attorneys and not of the plaintiff, and is of no effect as an admission or otherwise. (1 Starkie on Ev., 450; *Boileau v. Rudlin*, 2 Exch., 665; *S. C.*, 12 Jur., 899; *Church v. Shelton*, 2 Curtis, 271, and cases cited 6n p. 275.)

And the defect, if any, was cured by the further testimony on the part of the defendants; and the motion was not renewed at the close of the evidence on both sides.

II. The Court correctly decided that the evidence, admitted under the ruling on defendants' application to amend the complaint, did not amount to proof of waiver of notice of non-payment and notice of protest, by Saltus & Co., and was not sufficient, as between the parties to this action, to discharge the defendants from the performance of their agreement, to cause the note to be protested; and further, that there was no sufficient evidence to go to the Jury, of any waiver of notice of non-payment or notice of protest, on the part of Anna Saltus.

Nothing short of the clearest evidence of assent on the part of indorsers will amount to a waiver of notice of protest. The cases in which indorsers have been held to a waiver from the fact that they had received funds or security from the maker before maturity, are cases in which they either expressly agreed to waive notice, or did some act by which the holder was induced to omit protest, or when by taking into their possession all the property of the maker, by assignment, for the express purpose of meeting his liabilities, the indorsers have obtained everything which the notice was intended to enable them to obtain. (*Oswego Bank v. Knowler*, Lalor's Supp. to Hill & D., 122; *Coddington v. Davis*, 1 N. Y. R., 186; *Spencer v. Harvey*, 17 Wend., 491; *Leonard v. Gary*, 10 Id., 504; *Mechanics' Bank v. Griswold*, 7 Id., 165; *Taylor v. French*, 4 E. D. Smith, 458.)

The taking of security, or receiving funds in part payment, by the indorsers, does not operate as a waiver, nor can a waiver be implied in any case, from the transactions between the maker and the indorsers, unless the latter assume an unqualified liability to pay the note at maturity,

Coghlan v. Dinsmore.

and abandon their recourse against the maker. (*Seacord v. Miller*, 13 N. Y. R., [3 Kern.,] 55; *Kramer v. Sanford*, 4 Watts & S., 328.)

In the present case there was no such assumption of liability on the part of Saltus & Co., nor any waiver of their recourse against Nichols. The indemnity received by them was partial, and they did no act, and came under no obligation dispensing with the demand and notice which were the conditions precedent to their liability as indorsers.

As to Anna Saltus, the other indorser, there was no evidence whatever of any implied waiver. She was not a party to the alleged agreement with Nichols; Saltus & Co. were not her agents or attorneys. She was, therefore, liable to plaintiff on her distinct contract of indorsement. (*Seneca Co. Bank v. Neass*, 3 Com., 443; *Mohawk Bank v. Corey*, 1 Hill, 513; *Cayuga Bank v. Warden*, 2 Seld., 19.)

The only exception on this point was taken to the entire ruling of the Court; and if either proposition was correct, the exception must fail entirely.

III. The Court correctly refused to charge the Jury, as requested, that even though the plaintiff had lost his recourse against the indorsers, through the defendants' negligence, the plaintiff could not recover unless the Jury should believe, from the evidence, that Nichols, the maker of the note, was insolvent.

There was no conflicting evidence on this subject to submit to the Jury.

The plaintiff was not bound to prove insolvency on the part of the maker (the point requested to be charged) in order to entitle him to a recovery.

The ground of the action was the negligence of the defendants. All that the plaintiff was required to show was failure on their part to perform the duty undertaken by them. This raised the presumption of their liability for any loss sustained by the plaintiff by reason of their neglect. (*Walker v. Bank of State of N. Y.*, 5 Seld., 582; *Bank of Utica v. Smedes*, 3 Cow., 662; *Bank of Utica v. McKinster*, 11 Wend., 475.)

Coghlan v. Dinsmore.

The plaintiff further showed that the maker of the note was unable to pay it at maturity, and that such inability continued up to the trial.

The burden of proof was then on the defendants to show, in reduction of damages, that the maker had ample funds to pay, if called upon, or any other fact showing that plaintiff had sustained no actual loss. (*Allen v. Suydam*, 20 Wend., 321, 329.)

The defendants gave no proof to reduce the amount of damages below the whole amount of the note, and made no request for any ruling in reference to damages. The plaintiff was entitled to nominal damages at all events, (*Allen v. Suydam*, 20 Wend., 330,) and the ruling requested could not, therefore, have been granted. Even if it had been a request to charge that only nominal damages could be recovered, unless the Jury believed that Nichols was insolvent, it would have been equally objectionable. The plaintiff would have had a present and immediate right of action against the indorsers had the defendants done their duty. This was lost by their neglect, and they could not compel the plaintiff to await a liquidation of the affairs of the maker, or to resort to a sale of his mortgaged real estate, with its attendant delays and right of redemption, or to abide the event of the rebellion, and the release of his confiscated property.

ROBERTSON, J. The plaintiff was entitled to the security of the liability of all the parties to the note in question who were originally liable, and the defendants were bound to take all necessary steps to secure that liability. For any failure to take such steps the defendants were liable to the extent of any damages suffered by the plaintiff. The maker, of course, is liable at all events; and if he is solvent no damage has been suffered; if not, the defendant is liable for not charging the indorsers, unless they never were liable or were insolvent and worthless. In such case it is not necessary for the plaintiff to prove any solvency of the indorsers; his dereliction of duty casts the burden on

Coghlan v. Dinsmore.

the delinquent agent, of disproving their solvency. (*Walker v. Bank of State of New York*, 5 Seld., 582; *Bank of Utica v. Smedes*, 3 Cow., 662; *Bank of Utica v. McKinster*, 11 Wend., 475; *Allen v. Suydam*, 20 Id., 329, Per Chancellor WALWORTH.) The fact that in some cases the plaintiff introduced evidence to prove the insolvency of the maker or solvency of the drawer, does not affect the rule. (*Bank of Utica v. McKinster*, 11 Wend., 473; *Smedes v. Bank of Utica*, 20 Johns., 372; *Mechanics' Bank v. Merchants' Bank*, 6 Metc., 13; *East River Bank v. Godney*, 4 E. D. Smith, 582.) Possibly the burden may lie on the plaintiff to prove the insolvency of the maker, but in this case that was *prima facie* established. The plaintiff is not bound to wait forever for a chance of collecting from the maker: his money is due forthwith. The attempt to show that Mrs. Saltus was never responsible failed.

The defense, therefore, of the defendants rest in the continued liability of Saltus & Co., on the note, and their waiver of demand and notice; and they also claim that the \$1,000 paid by the maker to Saltus & Co. should go in mitigation of damages. No such partial defense as the last is set up in the pleadings, nor was any application made to amend them for the purpose; and if it had been made, it would have been untenable. There is no evidence that the maker of the note paid such sum to the indorser to be paid over to the holder; he paid it to him as his creditor on a general promise to take up the note and protect him. It became the indorsers' money; no action lay for it in the plaintiff's favor. The indorsers promised, in consideration of its payment, to take up the note and give the maker credit for the residue of what was due, for a year, which the latter promised to pay, the note to be retained as an evidence of debt. Any other person might have made the same promise, and yet not have discharged the defendants from liability on a contract made before such promise. No such secret collateral agreement could discharge them.

The only remaining question is, if Saltus & Co. are

Coghlan v. Dinamore.

liable as indorsers. They may have been liable to the plaintiff on their new undertaking to pay the note, although made to a third person, (*Del. & Hud. Can. Co. v. Westchester Co. B'k*, 4 Denio, 97,) and so might any other person on a similar promise, but no such liability is set up in the pleadings, and the relation in such case is different. The real question here is, whether knowledge by the indorser of the inability of the maker to pay, his notice to them that he would not pay, and their promise to pay, amounts to such waiver of notice as to make them liable as indorsers. It has been held that where the indorser takes upon himself the duty of inquiring if a note is paid, (*Phipson v. Kneller*, 1 Stark., 116,) or has an assignment of all the maker's property, (*Mechanics' B'k v. Griswold*, 7 Wend., 175,) or is preferred in a general assignment, (*Coddington v. Davis*, 3 Denio, 16; *Taylor v. French*, 4 E. D. Smith, 458,) or becomes otherwise the party to take up the note as between him and the maker, by taking security, (*Seacord v. Miller*, 3 Kern., 58,) or releases the maker, (*Burke v. McKay*, 2 How. U. S. R., 66,) or when he is furnished by the maker with all the funds he has, or equal to the amount of the note, and agrees therewith to pay the note, (*Isley v. Jewett*, 3 Metc., 434,) either of such acts operates as a waiver; and so even a promise to take up a note if not paid by another. (*Boyd v. Cleveland*, 4 Pick., 525; *Marshall v. Mitchell*, 35 Maine, [5 Red.,] 221.) It is undoubtedly true, as a general rule, that where any steps to charge the indorser are prevented by some acts of his which puts the holder off his guard, the latter is excused, (*Bruce v. Lytle*, 13 Barb., 163; *Spencer v. Harvey*, 17 Wend., 489,) but I am not prepared to say that, therefore, a promise to the maker, not known to the holder, would be sufficient. The fact that the maker is thrown off his guard in preparing to pay the note, does not affect the relations of the holder and maker; it does not operate either as an estoppel or contract between them. But when the latter promises the former to pay absolutely and unconditionally, he has a right to assume that the duty of notifying the indorser of a failure

on the maker's part is dispensed with, and that he need not rely upon the maker at all. Notwithstanding a promise by the indorser to the maker, the former may not be able to pay and still not lose his right of proceeding forthwith against the maker, to secure himself, which is the object of the notice. When the promise is made only privately to the maker of the note, the indorser does not expect the holder to rely upon it, because it is not made to him. A promise to pay, unconditionally, does not operate as a contract but as an estoppel, and when made to the holder is an admission that the indorser will suffer no injury for want of demand and notice, which is the test applied by Judge NELSON, in *Mechanics' Bank v. Griswold*, (7 Wend., 168.) I cannot, therefore, subscribe to the reasoning in *Marshall v. Mitchell*, (*ubi sup.*) which makes a promise to the maker equivalent to a promise to the holder as a waiver; and no other case goes so far.

But even if it were so, the defendants in this action ought not to be allowed to avail themselves of a private agreement, unknown to the plaintiff, and first disclosed on the trial; and that, too, where the evidence of the parties concerned is conflicting as to the whole transaction. The result, perhaps, might be, that in this action the plaintiff would fail to recover against the defendants, by the view the Jury would take of the testimony; and in the action by him against the indorsers he might also fail from a different view taken of the same testimony, and thus fail altogether by the defendants' neglect of duty. I think, in such case, the evidence must bring home knowledge to the holder, at least before the commencement of the action, of the existence of such waiver, if not his actual presence when it was made, before he can be deprived of his right to recover.

The plaintiff is of course not entitled to a double satisfaction, and the defendants are, therefore, probably entitled to subrogation to his rights to the extent of whatever part of the note they may pay. If they pay the whole

Coghlan v. Dinsmore.

note, they may proceed against the indorsers, and enforce their liability if they can establish it.

The decision of the Court that no waiver of demand and none had been proved, and its refusal to charge that the plaintiff could not recover unless Nichols was insolvent, were correct. The counsel for the defendants did not require any other facts to be submitted to the Jury; the motion for a nonsuit was properly denied, and there was, therefore, no error in the charge or exclusion of evidence.

The judgment should be affirmed with costs.

WHITE, J., concurred in affirming the judgment.

BARBOUR, J., (dissenting.) The measure of damages, in a case of this kind, is the amount which the owner of the note has lost by the failure of the carrier or agent to perform his duty by protesting the note. (*Van Wart v. Woolley*, 5 Dowl. & Ry., 374; *Allen v. Suydam*, 20 Wend., 327; *Warren Bank v. Parker*, 8 Gray, 222; *Bank of Utica v. McKinster*, 11 Wend., 473; *Stowe v. Bank of Cape Fear*, 3 Dev., 408; and see also, *Russell v. Palmer*, 2 Wilson, 325; *Clark v. Smith*, 10 Conn. R., 1; *Varril v. Heald*, 2 Greenleaf, 91; *Wolcott v. Gray*, Brayton's R., 91; *Potter v. Lansing*, 1 Johns., 215.) In order to sustain his case, it was incumbent upon the plaintiff, therefore, to show, *first*, that the maker was insolvent, which was done; and, *secondly*, that the indorsers, or one of them, were good, which he did prove; and, *thirdly*, that, because of the failure of the defendants to protest, the indorsers, or the only good one, were legally exonerated from the payment of the note or some part of it. In regard to this, he proved that Anna Saltus was good, and was thus exonerated. But he failed to show that Saltus & Co., who were able to pay, were so released or discharged from liability. On the contrary, it appears from the evidence, that the firm of Saltus & Co. had received from the principal obligor in the note, \$1,000, as a payment to that extent; and that, in consideration of such payment, made in advance, they

Field et al. v. Banker.

undertook and agreed to protect, *i. e.*, to pay, the note. The payment and agreement Nichols swears to positively. That \$1,000 must be considered, under a well known rule of law, as having been received by Saltus & Co., in trust for the plaintiff; and he can as readily collect the same from them as he could have recovered against them upon the note, if it had been duly protested and notice sent to them. This is sufficient to show that the Judge erred in directing the Jury to find a verdict for the whole amount of the note, without considering the question as to whether the undertaking to protect the note was supported by a sufficient consideration, or is good, not being in writing, under the statute of frauds.

The judgment should be reversed, and a new trial granted.

Judgment affirmed.

ALFRED FIELD *et al.*, Plaintiffs, v. JAMES H. BANKER,
Defendant.

1. The plaintiffs, who were engaged in the business of purchasing hardware, abroad, upon commission, and shipping it to the persons for whom they had received orders therefor, received an order from the defendant in the following terms: "I annex memorandum of chains, which please forward by an early packet, giving the preference to the 'Black Ball Line,' at lowest rate of freight;" this was followed by a description of the goods, and it terminated with expressing "hopes that the quality, price and charges would be so favorable as to enable him to give them further orders." They made a contract in England for the purchase of the goods in their own name, the defendant being unknown there, and notified him that the goods were contracted for; and they paid for them, and subsequently shipped them, consigned to the defendant, by the 'Black Ball Line,' receiving a bill of lading therefor, which contained an exception exempting the carriers for liability for loss by fire. Before having left port the goods were injured by a fire which occurred upon the vessel, and were sold for whom it might concern.

Held, That the relation between the plaintiffs and the defendant was not that of vendor and vendee of the goods; but the plaintiffs were the defendant's agents for their purchase, and as such agents, were not bound to insure the goods. (BARBOUR, J., dissented.)

Field *et al.* v. Banker.

2. In such a case the plaintiffs are not barred from maintaining their action to recover the price paid by them, and their commissions, by reason of their having accepted for the goods, a bill of lading exempting the carriers from their common law liability. Since the goods were not wholly lost, but only injured, the defendant's claim, if any, on that account, must be established by him, affirmatively, by way of recoupment or counterclaim.
3. There being, in this case, no evidence that the contract of shipment was out of the usual course, or that the plaintiffs could have made any better one, at the "lowest rate of freight," according to the terms of the order,
Held, that it was correct to instruct the Jury that it was the duty of the plaintiffs to have taken a bill of lading in a proper and usual form, and that the one taken was a sufficient compliance with that duty. (BARBOUR, J., dissented.)
4. Evidence that it was the custom of hardware merchants to transmit to their consignee immediate notice of having made a consignment, is inadmissible, the plaintiffs, in this case, having acted only as agents, and not as vendors.

(Before ROBERTSON, WHITE and BARBOUR, J. J.)

Heard, June 12; decided, October 6, 1862.)

THIS was an action brought by Alfred Field, Robert Ibbotson and Benjamin F. Errington to recover money expended by them for the defendant's benefit, and a commission for the purchase of certain goods for him, by them, as factors or agents.

In the year 1858, the business of the plaintiffs, who were partners and had houses in New York, Birmingham and Liverpool, was that of purchasing hardware on commission, and shipping it, when purchased, to the United States; the orders being received in New York, Philadelphia and elsewhere, and forwarded to Birmingham for execution, and the purchases made at Birmingham or in that vicinity. They sent goods purchased to the order of the party who gave the order, through the medium of their Liverpool house, unless instructed to employ other shippers, which was sometimes the case. In September, 1858, the defendant delivered to one of the plaintiffs, who was the partner resident here, (Robert Ibbotson,) a written order, dated on the 14th of that month, directed to the plaintiffs, in which he said, "I annex memorandum of chains, which please forward by an *early packet*, (giving "the preference to the *Black Ball Line*,) at lowest rate of

Field et al. v. Banker.

"freight;" this was followed by a description of the goods, and it terminated with expressing "hopes that their "quality, price and charges would be so favorable as to "enable" him to give them further orders. The usual commission on shipping heavy goods, such as chains, was then three per cent commission, and in this case, such were the terms agreed on, with a ninety day note from the date of invoice. The order so given was received by the plaintiffs' house in Liverpool, on the 27th September, and the chains so ordered were purchased by the plaintiffs' house in Birmingham, and written notice that they were contracted for given to the defendant on the 27th of October, 1858, by the resident partner of the plaintiffs, and also that they would be forwarded from Liverpool, according to the special directions he had given in the order. These goods were marked with the defendant's initials, and forwarded in October and November, 1858, by railway and canal, to the plaintiffs' house in Liverpool, which place they reached on the 10th of December, 1858. On the 9th and 18th of November, the latter were instructed by their house in Birmingham, to ship such goods to the defendant in New York, by the 'Black Ball Line' in preference.

In November, 1858, the freight for goods from Liverpool rose to a very high rate, reaching its climax about the 23d of that month, and the plaintiffs directed their shipping agent to delay shipping these goods, in hopes of lower rates. On the 2d of December following, such rates fell thirty per cent, and the plaintiffs engaged freight for these chains on board of "The Isaac Wright," one of the Black Ball Line, on board of which vessel the same were shipped on the 10th of that month, and a bill of lading in favor of the defendant, dated the same day, received from the master on the 20th of that month, in which the agreement to deliver was made, subject to the exception of *"dangers and accidents of fire, the seas and navigation"* of every nature and kind.

An invoice of such goods had been sent by the plaintiffs' house in Birmingham, to their house in New York, on the

Field *et al.* v. Banker.

4th of December, 1858, through the general post-office in Birmingham. The bill of lading of these goods, with an invoice, which had been received by the plaintiffs in Birmingham on the 21st of December, was deposited by the plaintiffs, in Birmingham, in the general post-office, inclosed in a letter or envelope directed to the defendant in New York, on the 24th of December, 1858, before the departure of the mail which would reach Liverpool in time for the sailing of the next Cunard mail steamer from that port to New York, which was the first that sailed after the shipment of the goods in question, at Liverpool;—such being the usual practice of the plaintiffs. The invoice so forwarded was headed "*Invoice of hardware purchased by order, and for account and risk of Mr. James H. Banker, New York, forwarded to Messrs. Field, Ibbotson & Co., for shipment, &c.*"

The "*Isaac Wright*" started to sail from Liverpool before the 23d of December, 1858, after having been for five days in the river Mersey; but was compelled to put back in consequence of the breaking of a windlass, and on the 23d of that month she took fire while at anchor in the river and was burnt, and scuttled to put out the fire; the chains were sold at Liverpool, at auction, for whom it might concern.

Various mail steamers arrived from Liverpool in New York, between the 23d of November, 1858, and January, 1859; one, which sailed on the 10th of November, arrived on the 23d of November; one, which sailed on the 4th of December, arrived on the 19th; and another, which sailed on the 11th, arrived on the 27th of December, after the fire. There were other steamers from other ports.

The plaintiffs subsequently re-executed the same order for the defendants.

The complaint alleged that the plaintiffs were, and are, partners engaged in the business of purchasing commission merchants in England and the United States, under a certain firm, and that in such business they received orders in the City of New York and elsewhere in the United States,

Field et al. v. Banker.

for hardware, to be by them bought and paid for in England, and shipped thence directly to the person giving the order therefor, and at his risk, for which they were to receive the purchase price of the articles by them bought and shipped, and certain shipping expenses and commissions in that behalf, in ninety days from the date of the invoice.

It further alleged that on or about the 14th of September, 1858, the defendant gave the plaintiffs an order for a quantity of chains, to be by them purchased in England, and to be shipped to the defendant in New York, upon the terms, and according to the course of business of the plaintiffs; and the plaintiffs, in pursuance of such order, purchased and paid for such chains in England, and shipped the same on board of the ship "Isaac Wright," at Liverpool, in England, to the defendant in New York, and forwarded to him, in the usual manner, a bill of lading and invoice thereof, which were received by him in January following.

It then set out the amount of the purchase-money and commissions, and demanded judgment for the amount.

The defendant, in his answer, controverted the plaintiffs' business, their purchase of the goods and their payment of the price. He denied that he ordered the goods to be purchased or shipped upon the terms or according to the course of business set out in the complaint, and that the plaintiff forwarded to the defendant a bill of lading or an invoice of the goods, and every other allegation, except as therein after stated. He averred therein that he ordered such goods to be purchased for, and shipped to him, upon the terms and according to the usage, custom and course of business of parties engaged in the hardware trade in the City of New York, having branch houses in England; he further averred that he gave the order to the plaintiffs for such chains, to be procured of their houses in Birmingham or Liverpool, and forwarded to him in the usual course of parties in such trade; that he was informed that the plaintiffs had contracted for such chains at certain prices,

Field et al. v. Banker.

and he never received any further notice of the shipment of such chains until the 10th of January, 1859, when he received a letter dated the 24th of December previous, inclosing an invoice and a bill of lading, dated 10th of December.

The defendant further averred, in his answer, that it is the usage and custom of hardware merchants in the City of New York, engaged in business in England, and in shipping hardware from thence to persons buying in New York, immediately upon shipping goods in sailing vessels to the City of New York, to notify the consignees, by steamer, of the shipment of the same, and forward an invoice of the same by such steamer, so as to give the consignees an opportunity of insuring. He further averred therein, that between the 9th of November and 8th of December, there were seven steamers by which letters could have been sent notifying him of such shipment; that the "Isaac Wright" was known as a sailing vessel, and not a steamer, and was burned on the 23d of December, 1858, and her cargo destroyed; and the defendant had no insurance on such chains in consequence of the failure to inform him of such shipment. He finally denied receiving such chains.

The cause was tried before Mr. Justice WHITE and a Jury, on the 7th of April, 1862. On the trial the defendant moved to dismiss the complaint, on six grounds, chiefly, however, involving the principle that the plaintiffs were bound to have taken a bill of lading making the owners of the vessel liable for the loss of the chains, and that in consequence of their taking a bill of lading exempting the carriers from liabilities for fire, the defendant was not liable. The defendant's counsel offered to prove the custom set out in his answer, which was excluded, and he excepted to the exclusion. He then offered to prove, *first*, a general custom, where goods are ordered in New York of merchants having branch houses in England, or agents of such houses in this city, which are to be shipped from England directly to the purchaser in New York by a sailing vessel, imme-

diately to notify such purchaser of the shipment; *secondly*, a like custom not only to notify of such shipment by steamer, but also to forward an invoice of the goods by the same steamer, to enable the consignees to insure the same; which was refused, and to such refusal he excepted.

The Judge before whom the cause was tried, charged the Jury, that it was the duty of the plaintiffs to notify the defendant in the ordinary way, by steamer, within a reasonable time after the goods were shipped; that it was the duty of the plaintiffs to have taken the bill of lading in a proper and usual form, and the one taken was sufficient compliance with that duty; to which the defendant's counsel excepted.

The defendant's counsel requested the Court to charge in substance:

I. That, as matter of law, the bill of lading in this case did not give the defendant such a remedy against the carrier as he was entitled to.

II. That, without instructions, the plaintiffs were not authorized to take a bill of lading exempting the carrier from liability for loss by fire.

III. That, by being deprived of the liability of the carrier, the defendant is relieved from any liability to the plaintiffs.

This the Court refused; and the defendant's counsel excepted to such refusal.

The Jury rendered a verdict for the amount claimed, and the Court ordered the exceptions to be heard in the first instance at General Term, judgment to be suspended.

A. R. Lawrence, Jr., for defendants.

I. The Justice erred in denying the motion to dismiss the complaint.

There was no delivery of the chains to the defendant, either actual or constructive. The vendor sending goods by a carrier must exercise due care and diligence, so as to

Field *et al.* v. Banker.

provide the consignee with a remedy over against the carrier. (1 Parsons on Contracts, 445, note *g.*; *Buckman v. Levi*, 3 Camp., 414; *Clarke v. Hutchins*, 14 East, 475; *Alexander v. Gardner*, 1 Bing. N. C., 671; *Dawes v. Peck*, 8 T. B., 330.)

The plaintiffs, in violation of their duty, took a bill of lading, which exempted the owners of the vessel from responding for loss or injury to the chains, consequent upon fire produced by any cause whatever. Hence, as the vendors failed to provide defendant with the remedy which he was entitled to against the carriers, the mere shipment of the goods did not constitute in law a delivery to him, and he is not liable for their value.

II. The Justice erred in his refusal to charge as requested by the defendant's counsel.

III. The evidence offered by the defendant's counsel to show the usage, custom and course of business of hardware merchants, engaged in shipping goods to New York from England, was improperly rejected.

(*a.*) It is well settled that evidence of usage in a particular trade is admissible, for the purpose of annexing incidents to a written instrument, concerning which the written instrument is silent. (*Boorman v. Jenkins*, 12 Wend., 566; *Cooper v. Kane*, 19 Wend., 386; *Esterly v. Cole*, 3 Comst., 502; *Barber v. Brace*, 3 Conn., 9; *Brown v. Byrne*, 3 Ellis & Blackburn, 704, 716; *United States v. Arredondo*, 6 Peters, 715; *The Reeside*, 2 Sumner, 569; *Bank of Columbia v. Fitzhugh*, 1 Harr. & Gill, 239; *The St. Nicholas Ins. Co. v. The Mercantile Mv. Ins. Co.*, 5 Bosw., 246.)

Indeed, the rule to be collected from the numerous cases on this subject is, that any mercantile usage is admissible in evidence, unless it labors under the objection of introducing something repugnant to, or inconsistent with the tenor of the written contract. (*Humfrey v. Dale*, 7 Ellis & Blackburn, p. 274; Rule so stated per Lord CAMPBELL, Ch. J.; *Brown v. Byrne*, 3 Ellis & Blackburn, p. 704; Per COLERIDGE, J., at p. 716; *Moore v. Campbell*, 26 E. L. &

E., 522; *Cuthbert v. Cumming*, 30 E. L. & E., 604, and cases cited *supra*.

(b.) In this case, the contract between the parties consists of the order of the defendant of September 14th, and the acceptance by the plaintiffs of October 27th, 1858.

The contract is silent as to the usage, but there is nothing in the contract to which the usage is repugnant, and the offered evidence is precisely within the principle laid down in the cases *supra*.

(c.) Again, where there is a general usage of trade, all persons dealing with that trade are supposed to contract with them upon the footing of that usage, unless something inconsistent therewith appears in the agreement between the parties. (*Cooper v. Kane*, 19 Wend., 387; *Rushforth v. Hadfield*, 6 East, 519, per Lord ELLENBOROUGH.)

(d.) The parties by whom the usage was proposed to be shown were perfectly competent, from their experience in the hardware trade, to prove the usage. (*Mills v. Hallock*, 2 Edw., 652.)

IV. The evidence as to custom having been improperly excluded, the Court cannot say that if it had been received the same verdict would have been rendered, and its exclusion forms a good ground for a new trial. (*Anderson v. Busteed*, 5 Duer, 485; *Hahn v. Van Doren*, 1 E. D. Smith, 411; *Ward v. Washington Ins. Co.*, 6 Bosw., 230.)

Charles Jones, for plaintiffs.

I. The motion to dismiss the complaint was properly denied.

1. The plaintiffs had proved that they had purchased and shipped the chains in accordance with the defendant's order.

2. The defendant had notice that his order was accepted, and that the goods would be forwarded according to his directions.

3. There is no evidence that the bill of lading was not in the usual form of bills of lading given by the proprietors of the "Black Ball Line."

Field et al. v. Banker.

4. The plaintiffs being mere agents to purchase goods and ship them according to the defendant's order, and the plaintiffs having proved the purchase and shipment in accordance therewith, it was for the defendant to show (if any such defense existed) that the plaintiffs had failed in any duty which they as agents owed to the defendant, their principal.

There was no such evidence offered or given when the plaintiffs rested their case.

II. The evidence offered by the defendant was inadmissible.

1. The evidence of usage or custom was inadmissible.

(a.) It was not offered to interpret the meaning of the language of the contract. There is nothing equivocal or obscure in that respect.

(b.) It was not admissible to add to the written contract, evidenced by the order, and its acceptance, other and new terms. (1 Greenleaf on Ev., §§ 281, 292, 294; *Yates v. Pym*, 6 Taunt. R., 446; *Gibbon v. Young*, 8 Id., 254; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. S. O. R., 137; *Beals v. Terry*, 2 Id., 127; *The Schooner Reeside*, 2 Sumner, 569.)

2. The evidence offered was immaterial, and no foundation had been laid for its introduction.

III. The exceptions to the refusal of the Court to charge as requested, are not well taken.

There was no evidence that the bill of lading was not in the usual and ordinary form of bills of lading issued by the "Black Ball Line," by which the plaintiffs were directed to ship the goods, and there is no presumption that the plaintiffs violated their duty in this regard.

BY THE COURT—ROBERTSON, J. The defendant relies on two defenses in this case. *First*. The failure of the plaintiffs to notify him of the shipment of the goods in time to insure. *Second*. The taking a bill of lading exempting the carrier from liability for fire. Whether he considers the plaintiffs were bound to do both; that is, give such notice and take a proper bill of lading, or whether,

Field et al. v. Banker.

if he secured the liability of the carrier as an insurer, the object of the other act of duty would be sufficiently attained, and the plaintiffs relieved from its performance, does not appear. In either case it will be necessary to examine the relations of the parties, and discover the true nature of the contract.

In the first place, the contract was not to deliver the goods in New York, to the defendant, and his liability accrued before that event. It seems to be conceded that he would have become liable at least as early as the shipment at Liverpool. It could not, therefore, be a contract for the sale and delivery of the goods, unless the shipment at Liverpool was to be taken as such delivery; if so, upon that delivery and the forwarding of the bills of lading, the plaintiffs' performance of their part of the contract would be complete. No relation would remain between the parties as vendors and vendee, to impose on the former any duty to protect the latter from harm. Or even if a notice became necessary to the defendant as vendee, would the sale become void because not given at the earliest possible time after the shipment? If the contract was one of mere sale and delivery, it was the business of the defendant to select the carrier, or, if he left the choice to the plaintiffs, to be ready to insure his interest at the instant of shipment. The carrier was the agent of either the defendant or the plaintiffs, in such case; if of the latter, the delivery was not complete until the goods arrived in New York; if of the former, it was so the moment they were put on board.

But there was no such contract as that between vendor and vendee; the plaintiffs were authorized to buy and ship as the defendant's agents; they might have used his name as purchaser and left him alone responsible. It is true they personally assumed the responsibility to the sellers of the chains; but this did not alter the relation of principal and agent. From the domestic who is sent to a tradesman to purchase articles for daily use, to the agents employed to buy millions, the rule is the same; the moment

Field et al. v. Banker.

the purchase is made for the principal, he owns the property bought, from the time of its delivery to his agent, and is bound to reimburse the latter for moneys expended by him in the purchase; the property is at his risk and not his agent's, whatever responsibility the agent may be under for the care and safe transmission of the goods afterwards. They are his property, subject to the lien for the purchase-money, and not his agent's. The recollection of the only plaintiff examined, is clear and distinct upon the subject of the terms. He says, "these were the terms upon which the invoice was to be filled." The question was then put to him, "can you swear positively that you communicated to the defendant that you were to purchase on the terms enumerated, &c.," and he answered, "yes;" and being asked why, he said, "simply because it is our usage. I went immediately down when the order came." It is true, he added, "I have no distinct recollection of ever communicating these terms personally," but this means no more than that he testified to an invariable custom, although he did not recollect the particular occasion. The defendant, on his examination, undertook to deny the notice, but did not testify what the terms of the contract actually were. In his answer, also, although controverting the business of the plaintiffs, as described by them, he does not undertake to say what it was. There is not the slightest evidence in the case that the plaintiffs were either hardware merchants or manufacturers; the only evidence offered establishes that they were commission merchants; and the defendant, on his examination, does not undertake to deny it. The letter of 27th October, notifies the defendant that his order is contracted for at certain prices, to which he makes no objection. Under such circumstances, to infer that the defendant believed that he was buying goods of the plaintiffs, instead of employing them to buy them, would be utterly unwarrantable as a violation of all probability. I shall therefore be justified in assuming that they acted as agents, notwithstanding that, being in England, where

Field et al. v. Banker.

their principal was not known, they may have paid for the goods. It would be a novel doctrine that everything for which any one paid at the request of another, became the absolute property of the former, and the loss of it was entirely at his risk.

Assuming that these parties stood in the attitude of principal and agent to each other, the duty of the plaintiffs was manifest, to obey any orders of the principal as to the transmission of the goods, and in the absence of such orders to transmit them in the usual way. None of the liabilities or duties of a factor, to whom goods are consigned for sale, devolved upon them. They were not bound to insure, as the goods were to be but transiently in their possession; it was the duty of the principal to provide for that.

But the defendant directed the plaintiffs to ship at the lowest rate of freight, and in the first of the line of ships prescribed, that sailed after the fall in rates. There was no difficulty in the defendants insuring the goods by an open policy, without knowing in what vessel the goods were to arrive; they did so as to other risks, and there was no danger of loss of the premium, if the risk never attached. Unless they relied on their ability to do so, they should have directed the plaintiffs to insure.

The learned Justice before whom the cause was tried, charged the Jury that it was the duty of the plaintiffs to notify the defendant of the shipment in a reasonable time after it was completed; and the verdict was rendered upon that point in favor of the plaintiffs. No exception was taken to the charge upon that point, nor was any request made for a different instruction; and there is sufficient evidence to support the verdict.

But it is said that the plaintiffs must fail to recover, because they failed to procure insurance by the carrier; this would make the contract entirely conditional, depriving the plaintiffs of the right of recovering money paid for the defendant's use by them, because they did not have the goods insured. There is no pretense of reconpment or

Field et al. v. Banker.

counterclaim here. If the defendant is right, the plaintiffs could not recover, although the defendant had received the goods, merely because they failed in their duty in one particular. The loss of the goods was without the fault of any one, and they were not rendered entirely worthless; the plaintiff would have been entitled to recover something; the defense, therefore, should not be as a bar, but a mere recoupment or set-off.

In case of recoupment, the defendant is bound to make out his case affirmatively. The vessel in which the goods were shipped was of the line prescribed; the bill of lading was such as they chose to give; they could not be compelled to alter it and assume other risks, such as those undertaken by underwriters; and there is no evidence that the contract was out of the usual course, or that the plaintiffs could have got any better, so as to become chargeable with negligence. The rates of freight as prescribed, was to be the lowest, so that any additional sum for insurance was probably deducted; there is, therefore, no reason for dissatisfaction with the charge of the Court on that point.

The evidence offered in regard to customs of hardware merchants could not affect commission merchants; the rule of vendor and vendee is entirely different from that of principal and agent. A vendor whose contract is not fulfilled until the goods sold by him are entirely under the control of the vendee, stands in a different position from the agent who has acquired the property for his principal, and may still have duties to perform in regard to it before he can earn his commission. That evidence was properly excluded.

There being, therefore, no errors in the rulings of the Court or the exclusion of testimony, the verdict should be affirmed and judgment given for the plaintiff, with costs.

WHITE, J., concurred in this opinion.

BARBOUR, J., (dissenting.) The order for the goods in this case, which must be considered as the contract between the parties, is, in the usual form of orders given by

one merchant to another, and the only member of the plaintiffs' firm who conversed with the defendant upon the subject has no distinct recollection that he communicated to him the terms upon which the invoice or order was to be filled. Indeed, there is no evidence in the case to show that the defendant knew or supposed the plaintiffs were to buy the chains for him upon commission. That, however, is not very important, inasmuch as it is clear that the goods were ordered from the plaintiffs, and that they, in fact, purchased them in the name of their own firm, or upon their own responsibility, and now seek to recover the purchase price; and, therefore, that they did not act in the transaction as mere agents for the defendant. For the purposes of this suit, the parties may be considered as vendor and purchaser.

The plaintiffs, under the order given to them to forward the goods by packet, and the undertaking on their part to execute that order, were required to do more than merely to send such goods on board the ship. They were also bound to perform all such acts, incidental to the shipment, and customary among persons in that business, as would render the same effective and beneficial to the owner; such as taking a bill of lading, and sending forward an invoice so that the articles could be entered and passed at the custom house here. The taking of the bill of lading may be considered a part and parcel of the shipment itself, as such shipment would be incomplete without it. But it by no means follows that the placing of the goods on board and taking therefor a proper bill of lading was not an execution of the order to such an extent as to make the delivery to the defendant complete, even though no invoice, bill of lading, nor advice of shipment was sent forward at that time, or even until long thereafter. The consignors, in such a case, would, doubtless, be liable to the consignee for any injury sustained by him in consequence of such omission of duty on their part, but the delivery being complete, and the goods not having been destroyed, but only partially injured, he could only recover

Field *et al.* v. Banker.

such damages, in an action of this kind, by way of recoupment, and not as an absolute defense to the entire action. In this view of the matter, the exclusion of the testimony offered by the defendant to prove the custom of merchants in regard to sending forward advices of shipment and invoices was not erroneous, because the fact, if proved, would have been unimportant.

The plaintiffs were directed by the order to "forward, "by an early packet, giving preference to the Black Ball "Line." If the direction to forward had been general, without referring to any particular line, the plaintiffs would, undoubtedly, have been bound to ship the goods in the ordinary way, and upon such a bill of lading as is usual and customary among merchants and shippers, which the one taken in this case, containing as it does an exemption of the vessel from liability in case of loss by fire, is not. If the bill contains any exemption from liability, except from loss occasioned by the act of God or the enemies of the government of the country from which the goods are shipped, it is not the bill of lading which has been recognized by the common law for centuries as customary among merchants. It is the duty of the vendor, where goods are transmitted to a purchaser by a carrier, to exercise due care and diligence so as to provide the consignee with a remedy over against the carrier. (1 Parsons on Cont., 445, note *g.*; *Buckman v. Levi*, 3 Camp. R., 414; *Clarke v. Hutchins*, 14 East, 475; *Alexander v. Gardner*, 1 Bing. N. C., 671; *Dawes v. Peck*, 8 T. R., 330.) That obligation would, in the case supposed, have rested upon the plaintiffs; and to excuse themselves for its non-performance, it would be incumbent upon them to show that packet ships issuing the usual bill of lading could not be found.

I am unable to preceive that the direction to give a preference to the Black Ball Line, removes the obligation above suggested, or authorizes the plaintiffs to ship the goods otherwise than in the customary manner. They are to give a preference to the line in question; that is, all

Patrick et al. v. Metcalf et al.

things being equal, they are required to ship by that line. But the order no more empowers them to ship under a bill of lading containing unusual and extraordinary exceptions, than it permits a shipment by such line at an extortionate price, to the exclusion of other packet ships, offering to carry at low rates of freight. As the shipment, then, under the bill of lading set forth in the case, was unauthorized by the order, as well as in violation of the plaintiffs' legal obligations, it follows that the goods were never delivered to the defendant, under or in accordance with his order directing the plaintiffs to forward them by packet; and, therefore, no cause of action as alleged in the complaint, has accrued to them against the defendant.

For these reasons, the verdict should be set aside as contrary to evidence, and a new trial granted.

Judgment for plaintiffs on the verdict.

JAMES PATRICK *et al.*, Plaintiffs, v. BENJAMIN F. METCALF *et al.*, Defendants.

1. The plaintiffs alleged in their complaint, that their assignors having chartered a vessel, earned freight, which the defendants, the consignees of the vessel, had collected and refused to pay over. The defendants in their answer denied that the plaintiffs' assignors had chartered the vessel in any other way than by a charter-party, which provided that their right to any share of the freight should be contingent on the freight exceeding \$25,000.

Held, that this put in issue plaintiffs' allegation of a charter, and that the plaintiffs must prove, either an unconditional charter, or that under the charter alleged by defendants the freight had exceeded \$25,000.

2. *It seems*, that one to whom a fund was rightfully payable, cannot maintain an action against another, who, merely as agent for an adverse claimant, has collected the fund on behalf of the latter, in disregard of notice from the former not to do so.

(Before ROBERTSON, WHITE and BARBOUR, J. J.)

Heard, June 2; decided October 11, 1862.

THIS was an action brought by James Patrick and Alexander McDougal, to recover from the defendants,

Benjamin F. Metcalf and Samuel Duncan, a certain sum of money received by the defendants from officers of the government of the United States, for the transportation of certain goods from New York to Mare's Island.

The complaint alleged that the plaintiffs were partners composing the firm of James Patrick & Co., and the defendants composed the firm of Metcalf & Duncan. That prior to July 5, 1859, a firm of Wells & Emanuel had chartered a vessel for a voyage from New York to San Francisco. That about that day they agreed with the United States naval storekeeper in New York, to transport certain goods from New York to the navy yard at Mare's Island, for the sum of \$1,882.84, freight and prime, at a certain rate of freight, to be paid to them in the City of New York, on the receipt of a certificate or other proper evidence of delivery at their destination. That in pursuance of such agreement, such goods being shipped on board of such vessel, Wells & Emanuel executed a bill of lading in duplicate or quadruplicate in the usual form, of which all but one was delivered to such storekeeper, and that one was retained by Wells & Emanuel as evidence of the agreement. That on the 21st of July, 1859, Wells & Emanuel assigned such bill of lading, and their rights therein, and their rights to such freight, and delivered such bill of lading and assignment to the plaintiffs, and directed the delivery of such freight to them, who had ever since continued sole owners thereof, and exclusively entitled to receive it. That the goods were transported to San Francisco, where they arrived on the 10th of March, 1860, and from thence conveyed by the plaintiffs to Mare's Island. That in May following, the plaintiffs furnished to such naval storekeeper satisfactory evidence of the delivery of such goods at such navy yard; and he gave them a certificate that \$1,849.97 was a correct charge therefor, against the United States Navy Department, and a bill for that amount was approved by the commandant of the navy yard at New York, and thereupon the plaintiffs became entitled to receive that sum from the United

Patrick et al. v. Metcalf et al.

States government. That part of the sum last mentioned was due from such government for transporting such goods from San Francisco to Mare's Island. That the plaintiffs demanded the whole sum and the defendants forbade its payment, in consequence of which the navy agent refused to pay the same. That the defendants had notice of the assignment to the plaintiffs prior to August 20th, 1860, and the defendants were required to pay all the moneys they should receive for such freight to them, and that they would be held personally responsible therefor. That about the 17th of September following, the defendants wrongfully obtained from the United States navy agent at New York the sum claimed by the plaintiffs for transportation of such goods to the navy yard at Mare's Island, and have been requested to pay the same to the plaintiffs, but have always refused.

The defendants in their answer, controvert and put in issue the allegation in the complaint, as to a charter to Wells & Emanuel, of a vessel, except as stated in such answer; also, the making of any agreement with Wells & Emanuel for the transportation of goods, as set out in the complaint. They therein deny any shipment of such goods, according to such agreement, but aver their shipment by the United States storekeeper, under the charter set up in the answer, the execution of a bill of lading by the defendants, as agents of the master of such vessel, which was delivered to Wells & Emanuel, and the transportation of such goods under such bill of lading. They therein controvert the delivery of any bill of lading by Wells & Emanuel, and deny that it was binding on such vessel. They also therein controvert the assignment to the plaintiffs, and deny any right of Wells & Emanuel to pledge any bill of lading. They further admit therein that the plaintiffs were consignees of the ship at San Francisco, and as its agents, attended to the delivery of the cargo and collection of the freight, forwarded such goods to Mare's Island, and received a certificate of due delivery thereof, except a small part, valued at thirty odd dollars, for which services they have

Patrick et al. v. Metcalf et al.

been paid by the owners of such vessel, \$625; that the residue of the freight collected by them for such owners, did not amount to \$25,000, but only to \$22,900; the amount of freight for transporting such goods was \$1,849 $\frac{1}{10}$ ¢, leaving \$749 $\frac{1}{10}$ ¢, and still due to make up \$25,000. They also aver therein the refusal of the United States to pay the plaintiffs such freight or admit any liability to them therefor; and the commandant of the navy yard approved a bill made out to the master of the vessel, whereby the Navy Department became bound to pay such freight to such master, and the defendant received such sum as his agent. They deny the right of Wells & Emanuel to assign such freight.

The charter set up in such answer, and which is the only one admitted thereby, was one made by Wells & Emanuel with the owners of the vessel, (the B. D. Metcalf,) by which it was agreed that such vessel should perform a voyage from New York to San Francisco; that Wells & Emanuel should procure for her a cargo at a rate of freight so as to amount, in the whole, to \$25,000; that bills of lading should be executed by the master, who should, through his consignees, collect the freight when earned, and apply the same to paying such sum of \$25,000; and, if, after paying that sum and all expenses of loading such ship, chargeable to Wells & Emanuel, and a commission of five per cent to them, there should be any residue of freight money, it was to be equally divided between the owners of the vessel and Wells & Emanuel.

On the trial the plaintiffs produced an instrument in writing, dated July 8th, 1859, signed only by Wells & Emanuel, "*for the captain,*" purporting to be a bill of lading of the goods in question, as shipped on board of the B. D. Metcalf, bound for California, for certain freight, amounting to \$1,882 $\frac{3}{4}$ ¢. A witness, one of the firm of Wells & Emanuel, (Amos G. Wells,) testified that his firm procured from the United States naval storekeeper the freight mentioned in such instrument, and that the same was shipped on board of such vessel in the first part of

July, 1859, and that they shipped other goods on their own account, being a general assorted cargo, and that the vessel sailed from New York in October, 1859; that the plaintiffs have a house in San Francisco; his firm made the negotiation with the naval storekeeper for the shipment of the goods; he also testified to the signature of his firm to the supposed bill of lading, and an indorsement by them thereon, made on the 21st day of July, 1859, directing the freight to be paid to the plaintiffs' firm, and the payment of \$1,500 to him, for such order, by that firm.

It was admitted that such bill of lading was brought into Court from the naval storekeeper's office. A clerk of the plaintiffs' (Henderson) testified that one of the plaintiffs delivered it to him about the end of April, 1860, and he took it to the naval storekeeper; afterwards obtained a port-warden's certificate, and some days afterward freight bills in triplicate, certified by the commandant of the yard and the storekeeper, one of which was produced in the form of a bill against the United States Navy Department; the certificate stated the charge to be correct; on it an order for such freight was indorsed, signed by Wells & Emanuel in favor of the plaintiffs. A clerk in the navy agent's office (Blood) proved that the defendants claimed the amount of the freight soon after the delivery of the freight bills, and their prohibition of its payment to the plaintiffs, and that they received the amount in September, 1860, as attorneys of the captain of the vessel, upon a bill made out in his favor. The defendants' counsel admitted the execution, by certain persons, of a bond of indemnity in favor of the United States, in which it was recited that it had been agreed to pay such freight to the master of the vessel on his giving indemnity. A notice, demanding the freight received of the defendants, was also proved to have been served on them on the 18th of August, 1860.

The only evidence offered by the plaintiffs of any charter to Wells & Emanuel, was the allegation to that effect in the complaint; so also the only evidence of their causing the goods in question to be transported to San Francisco,

Patrick *et al.* v. Metcalf *et al.*

and afterwards to Mare's Island, at the expense of the plaintiffs, and of the receipt by the latter of certificates of due delivery, and of the amount of freight, consisted of the allegation in the complaint and admission in the answer to that effect, and of the furnishing of such certificates to the naval storekeeper at New York.

A certificate of due delivery at Mare's Island, indorsed on such bill of lading, was also read in evidence.

The counsel for the defendants moved to dismiss the complaint, which motion was granted; and an exception which was taken to such decision was ordered to be heard first at General Term.

George N. Titus, for the plaintiffs.

I. The order of Wells & Emanuel indorsed upon this bill of lading, which was delivered to the plaintiffs in July, 1859, was a valid, equitable assignment of this freight money, and entitled them to receive the same from the U. S. government, when earned.

(1.) It was an order for value upon the government for the payment of this freight, in accordance with the agreement of its authorized agent. Notice of this order (the order being indorsed on the bill of lading) was given to such agent by the plaintiffs in April, 1860. (2 Story's Eq. Jur., § 1044; *Lett v. Morris*, 4 Simons, 607; *Ex parte South*, 3 Swanst., 392; *Burn v. Carvalho*, 4 Mylne & Craig, 690, 702; *Yeates v. Groves*, 1 Vesey, Jr., 280; *Smith v. Everitt*, 4 Bro. Ch., 64; *Morton v. Naylor*, 1 Hill, 583.)

(2.) An assignment of freight, to be earned *in futuro*, is good in equity, and will be enforced against the party from whom it becomes due. (*In re Ship Ware*, 8 Price, 269; *Douglass v. Russell*, 4 Sim., 524; 2 Story's Eq. Jur., § 1055.)

(3.) No particular form is necessary to constitute an assignment of a debt in equity. Any order which makes an appropriation of it is sufficient. (2 Story Eq. Jur., § 1047.)

Patrick *et al.* v. Metcalf *& al.*

The order in this case was a valid assignment of this freight money to the plaintiffs. (2 Story Eq. Jur., § 1044.)

II. Upon the delivery of this order to Mr. Herrick, the naval storekeeper at the Brooklyn Navy Yard, he and the government agents, having notice thereof, became accountable to the plaintiffs for the debt then due for this freight. The money appropriated by the government for its payment, was a trust fund for the plaintiffs, upon which they had an equitable lien. (2 Story Eq. Jur., § 1041.)

In equity the assignee of a debt may enforce its payment by action directly against the debtor, although he may not have assented to its assignment, (2 Story Eq. Jur., § 1057; *Lett v. Morris*, 4 Simons, 607, and cases cited under first point;) and against any third party, who, having no superior rights, may have obtained the money appropriated for its payment. (*Story v. Lord Windsor*, 2 Atkyns, 630; *Shepherd v. McEvers*, 4 Johns Ch., 136; *Munsell v. Lewis*, 2 Denio, 224; 2 Story Eq. Jur., §§ 1057, 1058, 1059; *Bradley v. Root*, 5 Paige Ch., 632, 641, 642.)

III. In this case the defendants, without color of right, and with full notice of the assignment of this debt to the plaintiffs, intervened and obtained from the navy agent in New York the money appropriated by the government to its payment, which the plaintiffs were entitled to.

For the amount so received by the defendants they are liable to the plaintiffs, at law, as well as in equity. (2 Story Eq. Jur., §§ 1055, 1056.)

(1.) At law an action for money had and received, which is an equitable action, lies against a party who has obtained money which, in equity and justice he ought not to retain. (*Munsell v. Lewis*, 2 Denio, 224; *Fairbanks v. Blackington*, 9 Pick., 93; *Heard v. Bradford*, 4 Mass. R., 326; *Allen v. McKeen*, 1 Sumner, 317; *Durdon v. Gaskill*, 2 Yeates, 268.)

(2.) No privity of contract between these parties is necessary to support this action, save that which results from the defendants having possession of this money, which they have not a right conscientiously to retain.

Patrick *et al.* v. Metcalf *et al.*

The law, in such case, raises a promise that the receiver will pay, and that without a previous request. (1 U. S. Digest, (Assumpsit,) 285, § 415; *Mason v. Waite*, 17 Mass. R., 563; *Hawley v. Sage*, 15 Conn. R., 52; *Norton v. Coons*, 3 Denio, 130.)

(3.) The defendants are liable to the plaintiffs for this freight money, although they may have claimed the same on behalf of the captain of the ship, and as his attorneys. They had notice of its assignment to the plaintiffs, and that they would be held responsible for this money before they collected it. (*Garland v. Salem Bank*, 9 Mass. R., 408; *Frye v. Lockwood*, 4 Cow., 454.)

E. C. Benedict, for defendants.

I. The complaint does not show a cause of action against the defendants. 1. Wells & Emanuel did not assign any claim against the defendants. They had no claim against them to assign. 2. The plaintiffs had no claim, except against the shipper, and that claim could not be released or impaired by the defendants. 3. Between the plaintiffs and the defendants there was no privity, connection, or relation. They were strangers. 4. If the defendants were entitled to the money, they cannot be compelled to pay it to the plaintiffs. If they were not entitled to it they are only responsible to return it to the shipper from whom they got it. 5. If the plaintiffs were entitled to it from the shippers they are so still—the shippers having paid it to the defendants, did so in their own wrong, and could not set up that wrong against the plaintiffs' right.

II. On the proofs the case is weaker than on the complaint. The pretended cause of action is disapproved.

1. The freight did not belong to Wells & Emanuel, but to the owners of the vessel. 2. It was not collectible by Wells & Emanuel, but by Stetson, the master. 3. Wells & Emanuel had thus no right to collect the freight, or to assign it, or to order it paid to the plaintiffs. 4. It was not collected by the defendants, but by the owners of the ves-

sel, through Stetson, the master, for whom the defendants only acted as attorneys in fact. 5. Wells & Emanuel had no right to make and sign a bill of lading. The paper made and signed by them was not, in fact or in law, a bill of lading, and conferred no right on them to collect the freight. 6. The order to pay the money to the plaintiffs gave them no right to enforce the payment of the freight. It was but an order, and was not accepted by the captain, or the owners, or the defendants.

ROBERTSON, J. There was no proper evidence in this case of any charter of the vessel in question, entitling the plaintiffs to any freight, and it was not pretended that Wells & Emanuel had any other authority to collect it than the charter in evidence. The allegation in the complaint, of a charter, was distinctly put in issue by being controverted in the answer. (Code, §§ 149, 168.) If the plaintiffs wished to avail themselves of the admission in such answer of a charter containing the particular provisions therein alleged, he should have read it, and it would then have been evidence for the defendant of such provisions, (*Dorlon v. Douglass*, 6 Barb., 451; *Stuart v. Kissam*, 2 Id., 493,) and its effect would be confined to the issue raised. (*Robins v. Maidstone*, 4 Q. B., 811.) The specific denial of any other charter but that admitted, puts in issue the existence of any other charter giving the plaintiffs the right to the freight. (*Troy & Rutland R. R. Co. v. Kerr*, 17 Barb., 581; *Swift v. Kingsley*, 24 Id., 541.) The charter set up in the answer, if it be the one relied upon by the plaintiffs, gave them no right to freight unless that exceeded 25,000 dollars and expenses, of which there was no proof in this case, and such proof, upon that charter, the plaintiffs were bound to give.

There was evidence in this case, that Wells & Emanuel procured the freight for the vessel, and made the negotiation with the United States navy agent for the shipment of the goods in question to Mare's Island, but they signed

Patrick et al. v. Metcalf et al.

the bill of lading as agents for the captain, and only claimed to be entitled as charterers to the freight. That bill of lading was only signed by Wells & Emanuel, and not by any officer of the United States government, and was kept in their possession until April, 1860, when they sent it to collect the freight on it from the government officers, and left it in the naval storekeeper's office; no obligation was therefore imposed on the United States government or officers by that document; there was no evidence that they ever assented to its terms or agreed to pay Wells & Emanuel the freight; indeed, the agreement, if any, is professed to be made for the captain of the vessel. There was, therefore, no agreement by the naval storekeeper to pay them the freight established.

The answer also controverts and puts in issue any shipment of the goods in question, pursuant to any agreement with Wells & Emanuel, and avers they were put on board in pursuance of the charter set up in the answer, and a bill of lading given therefor, in the name of the master, by the defendants as his agents. This is far from admitting any liability by the United States officers to Wells & Emanuel.

The complaint alleges that Wells & Emanuel caused the goods in question to be conveyed to San Francisco, and from thence they were taken at the plaintiffs' expense and by their procurement, to Mare's Island, and delivered to the proper officers. The answer only admits that they forwarded them as agents of the ship, and alleges they were paid six hundred and twenty-five dollars therefor. It is true the defendants have not denied that they carried them otherwise than as agents, but the plaintiffs did not claim that their allegation was not controverted, but only that it was admitted.

Besides the defects in the plaintiffs' evidence, there is a fatal objection to their recovery against the defendants. The latter claimed only as agents of the captain of the vessel, (Stetson;) the bill against the government was made out in his name; the receipt was signed by them as

agents for him, and the bond of indemnity was given for the payment to him; it was the same thing as if the money had been paid into his hands. I do not see how any notice to them not to collect as such agents, can make them liable. The money had no earmark in the possession of the United States officers; never became the plaintiffs' until it was paid over to the captain; was not converted by the defendants as the plaintiffs' property. If they are responsible, every clerk sent by his employer to collect a bill claimed as due to the latter, is responsible to a third party for the money he may receive, if he happens to know that such third party claims to be paid for the same services. I do not see that the defendants, having received the money for the captain, could interpose as a defense to a suit by him, that the plaintiffs were entitled to it, or how, having been employed by him, they could be converted into agents for the plaintiffs.

These considerations are sufficient for the disposition of the case; the remaining question of the right of a party to sue another, with whom he has no privity, for money paid the latter by a supposed debtor, upon an adverse claim, if that debtor be the Federal Government, need not be considered. It may, however, be noticed that neither the case of *Munsell v. Lewis*, (2 Den., 224,) nor *Bradley v. Root*, (5 Paige Ch. R., 632, 641, 642,) if closely scrutinized, will be found to go that length; there was privity with those cases, between the claimants, and the question itself was not discussed. No authority or reason can be shown for any general principle that any one can sue another for money paid by a third person to the latter, on a claim of right by him, merely because the second claimant ought to have been paid the same amount, for the same cause, by the same person, where there is no pretense of trust or authority, by the recipient, for such new claimant.

For the reasons before mentioned, the judgment should be affirmed, with costs.

WHITE, J., concurred in this opinion.

Lowber v. Kelly *et al.*

BARBOUR, J. I concur in the conclusion; but only upon the ground that the plaintiffs failed to prove the unconditional charter set up in their complaint.

ELIZABETH G. LOWBER, Plaintiff and Appellant, v. WILLIAM KELLY *et al.*, Defendants and Respondents.

1. A grantee of land, under a deed which is void by the statute by reason of the land being held by a third person adversely to the grantor, cannot, upon his grantor's refusal to bring an action to recover the land or to allow such action to be brought in his name; maintain an action against the grantor and the adverse possessor, to have the latter adjudged to surrender possession to the grantor, and the title and possession adjudged to the plaintiff as against the grantor.
2. An action to recover the lands must be brought by the grantor, or in his name, by the grantee; but it cannot be so brought in his name without his consent, except since the statute of 1862.

(Before ROBERTSON and WHITE, J. J.)

Heard, June 9; decided, October 9, 1862.

THIS action was brought by the plaintiff, who was out of possession of certain lands she claimed, against William Kelly and Gabriel Winter, defendants, the latter of whom was in possession thereof, to obtain a judgment, that the title to it is vested in the defendant, Winter, and he is entitled to the possession thereof, and that as between him and the plaintiff, the title in fee simple thereto is in the latter, and that the defendant, Kelly, be required to surrender to the plaintiff the possession of the premises, and pay her damages for withholding the same.

The complaint alleges the ownership in fee of the premises in question, by one Gabriel H. Winter, in January, 1848, and its descent to the defendant, Winter, as his sole heir at law, and a conveyance by the latter in September, 1860, of the premises to the plaintiff in fee. It further alleges that the defendant, Kelly, claims that at the time of the execution of the conveyance to the plaintiff, such

premises were in his possession, and he then claimed them under a title adverse to that of Gabriel Winter. It also alleges that the plaintiff has not parted with any rights and claims to be owner in fee simple of such premises, and did not know, at the time of the conveyance to her, that the defendant, Kelly, claimed such premises under a title adverse to that of the defendant, Winter; also that she had requested Kelly to deliver up the premises, and the defendant, Winter, to allow her to commence a suit in his name, to recover possession of such premises, offering to indemnify him against any costs, but he has refused.

The demurrer to the complaint sets forth as its grounds,

1st. That it is not alleged therein that Gabriel H. Winter was in possession of the premises in question on the 20th of June, 1842, or at any other time, or died seized thereof, or that the defendant, Winter, was ever seized of such premises in September 1860, or at any other time, while it is admitted that William Kelly claims that he was in possession of the premises adversely to the defendant, Winter.

2d. That there is a defect of parties by joining the defendant, Winter, with the defendant, Kelly, in an action at law, in the nature of ejectment against the latter, at the same time that the title of the premises may be declared in the defendant, Winter, as between him and the plaintiff.

3d, That several causes of action have been improperly joined, seeking equitable relief against Winter, and a judgment for damages against Kelly.

This Court, at a Special Term, held by Chief Justice BOSWORTH in December, 1861, ordered judgment on the demurrer, in favor of the defendant, Kelly, with costs. From which order and judgment the plaintiff brings the present appeal. The decision at Special Term is reported in 17 Abbott's Pr., 452.

Ira Shafer, for plaintiff, (appellant.)

Lowber v. Kelly et al.

I. There is no pretense that this is an action at law against Kelly, founded upon the conveyance from Winter to the plaintiff, and hence the cases of *Burhans v. Burhans*, (2 Barb. Oh., 398,) *Jackson v. Demont*, (9 Johns., 55,) *Jackson v. Olits*, (8 Wend., 440,) and *Cole v. Irvine*, (6 Hill, 634,) and not controlling.

It is conceded by the demurrer that, as between Winter, whose default admits the allegations of the complaint, and Kelly, the former is the owner in fee and entitled to possession, and the latter has neither the fee nor the right to possession.

The demurrer, also, admits that, as between the plaintiff and Winter, in virtue of the deed, the former is the lawful and equitable owner, and entitled to possession.

II. The plaintiff's right to the relief demanded is sustained by authority. The statute relied upon by defendant is considered with disfavor. (*Humbert v. Trinity Ch.*, 24 Wend., 611; *Hoyt v. Thompson*, 1 Seld., 320, 347; *Sedgwick v. Stanton*, 4 Kern., 289; *Orary v. Goodman*, 22 N. Y., 170; 4 Kent's Com., 449.)

The maxim that there is no "wrong without a remedy," means in one sense "the means given by the law for the recovery of a right," and "whenever the law gives anything it gives a remedy for the same." (3 Bl. Com., 123; Brooms' Legal Maxims, 91.)

The remedy that the plaintiff seeks has been recognized and adjudged from an early day, in several cases in this State, and in Massachusetts. (*Jackson v. Vredenberg*, 1 Johns., 159; *Jackson v. Brinkerhoff*, 3 Johns. Cas., 101; *Williams v. Jackson*, 5 Johns., 489, 499; see Foot and Van Vechten's Arguments; *Jackson v. Leggett*, 7 Wend., 377; *Livingston v. Proseus*, 2 Hill, 526; 4 Kent's Com., 449; *Wolcott v. Knight*, 6 Mass. R., 418; *Brinley v. Whiting*, 5 Pick., 348.)

The title is not extinguished, but remains in the grantor, who recovers for the benefit of the grantee. (*Livingston v. Proseus*, 2 Hill, 529.)

The old practice was to insert counts in the declaration on the title of the grantor and the grantee, so that if the suit failed as to the one, it might succeed as to the other." (*Livingston v. Proseus*, *supra*; 2 Burrill Prac., 314; *Ely v. Ballantine*, 7 Wend., 470; Adams on Ejectment, 1st Am. ed., 188.)

The objections now raised were made in *Williams v. Jackson*, (5 Johns., 489, 493,) and in *Welcot v. Knight*, (6 Mass. R., 418,) and expressly overruled.

To count upon demises from different lessors, and claim and recover on different titles, and to insert in the declaration as many counts as the plaintiff pleases is not a practice which is authorized by the Code. (*St. John v. Pierce*, 22 Barb., 362.)

Under the Revised Statutes, the declaration might contain several counts, and several parties might be named as plaintiffs, jointly in one count and separately in others. (2 R. S., 304, § 11; *Ely v. Ballantine*, 7 Wend., 470.)

And if the plaintiff had made Winter one of the lessors without his permission, his name would not have been stricken out on motion. (Adams on Ejectment, 1st Am. ed., 188, 189; *Ely v. Ballantine*, 7 Wend., 470; *Doe d. Vine v. Figgins*, 3 Taunton, 440.)

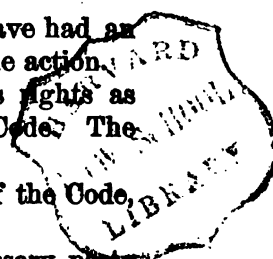
Thus before the Code, the plaintiff would have had an adequate remedy and could have maintained the action.

His rights as against Winter, and Winter's rights as against Kelly have not been affected by the Code. The remedy only has been changed.

The action is brought, according to § 111 of the Code, by the "real party in interest."

Winter is joined as a defendant as "a necessary party to a complete determination or settlement of the questions involved therein." (Code, § 118.)

And "the Court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights. (Code, § 122.)



Lowber v. Kelly et al.

The plaintiff cannot compel Winter to sue. Nor is he "the real party in interest." (See Code as amended 1862, § 111.)

If our positions are unsound, the Code has deprived a party, in an action to recover the possession of real property, of a remedy well recognized and adjudicated before and since the Revised Statutes.

If section 455 of the Code does not enable the plaintiff to avail herself of the provisions of the Revised Statutes, as has been adjudged, then the Code must furnish a remedy, or she is without any.

If Winter should sue Kelly, a recovery would enure to the benefit of Mrs. Lowber, (*Livingston v. Proseus*, 2 Hill, 526, 529;) and when he fails or refuses to sue, the law enables her to accomplish the same result by making him a defendant, and by adjudicating the rights of all of the parties.

Kelly being a trespasser, cannot raise objections that Winter does not raise, but expressly waives by making default, and which Winter could not raise because of the estoppel created by his deed. (4 Com. Dig., 76, 81, [A.] [D].)

As between the parties to the deed, it might operate by way of estoppel and bar the grantor. (4 Kent's Com., 449; *Jackson v. Demont*, 9 Johns., 55; *Livingston v. The Peru Iron Co.*, 9 Wend., 516; *Van Hoesen v. Benham*, 15 Wend., 164.)

Winter cannot claim as against his own deed, whether it is an estoppel or not. (*Jackson v. Bull*, 1 Johns. Cas., 90; *Jackson v. Stevens*, 16 Johns., 110.)

A quit-claim deed passes all the title of the grantor *in esse*, as well as a warranty deed.

It is no objection that the recovery will enure to the benefit of the grantee in the deed. (*Livingston v. Proseus*, 2 Hill, 526, per BRONSON; see argument of Van Vechten, in *Williams v. Jackson*, 5 Johns., 489, 492.)

What the grantee accomplished before the Code indirectly, and by means of a legal fiction, in a case like the present, we seek to accomplish directly by a statement of

the facts of the case as they exist. Every action now is emphatically an action on the case, and before the Code upon the facts stated in our complaint the plaintiff would have recovered.

At all events, Winter would have recovered for the benefit of the plaintiff. And the Code has not changed the legal rights of parties. If the doctrine contended for by the counsel for the defendant is to prevail, a person who is in possession of land without title may hold it forever. (See Van Vechten's argument in *Williams v. Jackson*, 5 Johns., 491.)

David P. Hall for the defendant, Kelly, (respondent.)

I. The demurrer is well taken, because it appears by the complaint, that the defendant Gabriel Winter was out of possession of the premises described in the complaint at the time of his grant to the plaintiff, to wit, on the 14th day of September, 1860, and that the defendant William Kelly was then in possession of said premises, claiming under a title adverse to that of the plaintiff. The grant was therefore void under the statute of maintenance. (1 R. S., p. 739, §§ 147 and 148.)

II. The demurrer is well taken because several causes of action are united in one complaint, a part against Kelly, and a part against Winter. First, the complaint is multifarious; second, there is a misjoinder of parties defendant; one having an interest, and the other having no interest, in the premises in controversy. The complaint must show that each person named as defendant has or claims an interest in the matter in controversy. (*Pinckney v. Wallace*, 1 Abbotts' Pr., 82.) Here it is not pretended, that Winter has any interest in the suit, or that he claims to have any interest.

III. The complaint does not state facts sufficient to constitute a cause of action, because it fails to state that Winter, the plaintiff's grantor, was possessed of the premises granted at the time of his grant to the plaintiff, and fails to state that he ever was possessed. It should have

Lowber v. Kelly *et al.*

stated affirmatively, that at the time of the grant, he was in possession, thereby giving the defendant an opportunity to traverse the fact.

IV. The plaintiff's complaint does not state facts sufficient to constitute a cause of action against the defendant, Winter, because the plaintiff, by taking a deed which the statute declares to be void, and which confers upon the plaintiff no right as against Kelly, did not acquire thereby any equity, which entitles her to require the defendant, Winter, on being idemnified, to bring a suit to recover the possession of the premises for her, nor, (on his refusing to do so,) to maintain a suit against Kelly and Winter in her own name, to recover possession of the premises as against Kelly.

Hence there was here a palpable misjoinder of parties defendant, the provisions of the Code not warranting the making Winter a party, for the purpose claimed in the complaint, for he is not the actual occupant, nor a person exercising acts of ownership, or claiming title thereto, or to some interest therein, at the commencement of the suit, which is necessary to render him liable in ejectment. (DENIO, J., in *Child v. Chappell*, 5 Seld., 259; INGRAHAM, J., in *Pinckney v. Wallace*, 1 Abbott's Pr., 82.)

ROBERTSON, J. The Revised Statutes (vol. 1, p. 739, § 148) provide that every grant of lands shall be absolutely void, if at the time of the delivery thereof they shall be in the actual possession of another claiming under a title adverse to that of the grantor; this is substantially the same as the Revised Laws of 1813. (Vol. I, 173, § 8.) The plaintiff's case requires that such statute should be read as though it made such grant void only in a court of law, but allowed the full benefit of it to be obtained in a court of equity, by simultaneously calling upon the grantor to recognize the title of the grantee, and compelling the claimant under an adverse possession, to surrender it. The process of reasoning, by which it is proposed to accomplish this result, is apparently simple, and is as

Lowber v. Kelly *et al.*

follows: The party claiming adversely is, of course, not entitled to hold against the former real owner and grantor of the plaintiff, and such grantor is not entitled to hold against the plaintiff, (*Livingston v. Proseus*, 2 Hill, 526, 529,) therefore, the adverse tenant is not entitled to hold against the plaintiff; this, however, leaves one gap, to wit: that the statute in question disables some of those, who otherwise would have a right to the land, from its recovery. Whatever may be the disfavor, into which the statute has fallen, courts are still bound to enforce it, leaving the Legislature to carry that disfavor if it exist to its conclusion, viz., a repeal. It was enacted to prevent actions being brought for land, except, either by those who were dispossessed of them, or those whom the law made their representatives, and to discourage acts of maintenance. The plaintiff would have its object to be simply to compel a party to have recourse to a court of equity instead of a court of law. No such purpose, has ever been suggested before for such statute. There is no doubt, that, in every case like this, counts might formerly have been inserted in a declaration, claiming under both grantor and grantee; so, that, if the grantor had actually had previous possession the grantee might recover. It is equally true that, although the whole truth must be told, under the present system, there is no difficulty in recovering under it by stating the conveyance to the plaintiff and omitting to state the adverse possession, if there is any doubt about it; because, if it be certain, the grantee's right to possession must fail. I do not see that the plaintiff could ever have maintained, in its proper sense, the action in her own name if the possession was adverse. She might have carried it on in another's name; but so far as she was concerned the issues must be decided against her. Winter is, certainly, entitled to sue, and is, therefore, the real party in interest; until he recover the plaintiff is bound to abstain from suing.

The error of the reasoning on behalf of the plaintiff

Lowber v. Kelly *et al.*

lies, in supposing that without the future action of her grantor, she has gained an immediate right to the land; this would repeal the statute entirely. The law so far tolerates the conveyance to a grantee, of lands held adversely, as to acknowledge his right when his grantor has recovered the lands; but, as the law does not permit lawsuits for land to be sold, the grantee is dependent upon the volition of the grantor for realizing his purchase. It is true, the party holding adversely cannot set up the conveyance by his adversary against him, for it does not injure him; but this is different from allowing a party to accomplish what the statute meant to defeat, to wit, the promotion of litigation.

It is not strictly accurate to say the plaintiff could, under the circumstances of this case, before the adoption of the Code, have recovered; for the complaint alleges that the defendant, Winter, refuses to bring any suit. Will it be pretended that any authority, before the Code, sanctioned a suit brought by her, without his consent in his name, or her own, at her election? If so, no section of the Code has altered it, and there is no need of making Winter a party. The statute of 1862 would be in such case useless, and half the prayer for relief sought in this action would be superfluous. Undoubtedly that statute sanctions actions hereafter brought by the grantee in the grantor's name; but it no where sanctions actions in the grantee's name. Until that change was made, the plaintiff could not have obtained any relief in the grantor's name, without his consent; and the argument of the learned counsel, in *Williams v. Jackson*, (5 Johns., 491,) was perfectly sound, with a single qualification, that a person in possession of land may hold it forever, provided the party dispossessed does not bring a suit in his own name. He cannot sell the right of action to others.

Various anomalies are proposed in this case, as, for example, that Winter shall recover judgment in a suit in which he is defendant, and lose the fruits of it forthwith by a simultaneous judgment against him in the plaintiff's

Morrison et al. v. Atwell et al.

favor; these are clearly two different causes of action. They do not arise out of the same transaction, one growing out of the dispossession, the other out of the deed; nor out of transactions connected with the same subject of action, the land not being the subject of the action, but its wrongful possession, (*Durkee v. Saratoga and Wash. R. R. Co.*, 4 How. Pr., 226; 2 Code R., 145; *Colwell v. N. Y. & Erie R. R. Co.*, 9 How. Pr., 311; *Coster v. Same*, 5 Duer, 677.) and clearly the cause of action against each defendant does not affect the other. (Code, § 167.)

The complaint is also defective on the plaintiff's own theory, since it does not allege that Kelly ever had adverse possession, but only that he claims that he claimed it. This would not make the grant to the plaintiff void, nor show any necessity to make Kelly a party to the relief sought against Winter.

But the complaint is defective on the merits, because no equity could formerly arise from a deed declared void, so far as it undertakes to confer any rights to sue a third person; and this action was commenced before the late statute, and is not in the grantor's name.

The order should be affirmed with costs.

WHITE, J., concurred in affirming the order.

JOHN and STATES D. MORRISON, Plaintiffs and Respondents, v. AMOS M. ATWELL *et al.*, Defendants and Appellants.

1. Where an assignment for the benefit of creditors is made, by the members of a partnership, giving preference to the payment of the partnership debts, a creditor of the partnership cannot have the assignment set aside as void, because its provisions as to the subsequent payment of creditors of individual partners contain a direction calculated to hinder and delay them. No creditor but the one who is hindered, delayed or defrauded by the particular provision complained of, can avoid the instrument on that account.

Morrison et al. v. Atwell et al.

2. An assignment purporting to transfer real as well as personal property, for the benefit of creditors, is not rendered void by a direction to pay rents, taxes and assessments which may become due before the lands can be sold. If the assignment contemplates an immediate sale, such a provision may, in the absence of evidence to the contrary, be presumed to have been intended for the benefit of the creditors, by increasing the fund.
3. Where copartners made an assignment which recited their copartnership, and their indebtedness as such, and assigned all the "property of every name and nature whatsoever of the said parties of the first part."

Held, that this was not an assignment of the individual property of the members of the partnership; and hence a direction in the assignment to pay rents, &c., due on lands, &c., assigned, did not apply to rents due from one partner individually for his dwelling house.

(Before ROBERTSON, WHITE and BARBOUR, J. J.)

Heard, June 9, 1862; decided, October 11, 1862.

APPEAL from a judgment entered after a trial of the cause at a Special Term, before Mr. Justice MONCRIEF, without a Jury, on the 21st of November, 1861.

The action was brought by the plaintiffs against the defendants, Peleg G. Berry and Homer L. Smith, who were judgment debtors of the plaintiff, and Amos M. Atwell and Vincent Kenyon, to whom Berry and Smith had made a general assignment for benefit of creditors. The object of the action was to set aside the assignment and have a receiver appointed and directed to pay the plaintiffs' judgment.

The assignment was, by its terms, expressed to be an indenture made, &c., "between Peleg G. Berry and Homer L. Smith, copartners, doing business in the city, under the name, style or firm of Berry & Smith of the first part," &c., &c., and recited and declared that "whereas the said copartnership is justly indebted in sundry considerable sums of money, and has become unable to pay or discharge the same with punctuality, or in full, and the said parties of the first part are now desirous of making a fair and equitable distribution of their property and effects among their creditors:

"Now, therefore, this indenture witnesseth, that the said parties of the first part, in consideration of the premises,"

* * * assign to the parties of the second part * * * .
 "All and singular, the lands, tenements, and hereditaments, situate, lying, and being within the State of New York, and all the goods, chattels, merchandise, bills, bonds, notes, book accounts, claims, demands, choses in action, judgments, evidences of debt, and property of every name and nature whatsoever of the said parties of the first part, except such as is by law exempt from levy and sale under execution, to have and to hold," &c., &c.

"In trust, nevertheless, and to and for the following uses, intents, and purposes — that is to say : "

"That the said parties of the second part shall take possession of all and singular the lands, tenements and hereditaments, property and effects hereby assigned, and sell and dispose of the same, and convert the same into cash with all reasonable dispatch and shall also collect all " debts, &c., &c., * * * * "and by and with the proceeds of such sales and collections the said parties of the second part shall first pay" costs, * * * * the expenses of the assignment, * * * * "and all rents, taxes, and assessments due, or to become due, on the lands, tenements and hereditaments aforesaid, until the same shall be sold and disposed of, and by and with the residue or nett proceeds and avails of such sales and collections the said parties of the second part" were directed to pay the partnership debts in a certain order of preferences, and afterward the individual debts of the partners share and share alike.

Among other facts, the Court found that, at the time of executing the assignment, the defendant Berry occupied a dwelling house under a letting which was to terminate about six months thereafter; and also found that, at the time of executing the assignment, the assignors' individual debts were unequal in amount, and that one of them (Berry) had individual property, but that the other had none.

Morrison et al. v. Atwell et al.

The plaintiffs having obtained judgment declaring the assignment void, the defendants' took the present appeal therefrom.

William Fullerton, for defendants, appellants.

Argued that the assignment was valid ; and as to the provision in reference to the payment of individual debts, cited *Collomb v. Caldwell*, (16 N. Y. R., 484,) *Goodrich v. Downs*, (6 Hill, 438,) *Barney v. Griffin*, (2 Comst., 365,) *Bogert v. Haight*, (9 Paige, 297,) *Curtis v. Leavitt*, (15 N. Y. R., 96, 97, 124,) and cases there cited.

T. D. Pelton, for plaintiffs, respondents.

I. The direction to pay rents, &c., delays the creditors. It is a power which the law does not confer upon assignees for the benefit of creditors, and renders the assignment void. (*Jessup v. Hulse*, 21 N. Y. R., 168, 169 ; *Burdick v. Post*, 12 Barb., 168.) The deed transfers individual as well as partnership property, (*Wharton v. Fisher*, 2 Serg. & R., 178,) and the provision appropriates copartnership property to pay individual debts first, which is fatal. (*Wilson v. Robertson*, 21 N. Y. R., 587.)

Again, this provision makes the amount for which some of the creditors are preferred dependent upon the action, if not upon the discretion, of the assignees. The debtor must declare his preference at the time of executing the assignment, and the rights of creditors must be fixed by the deed itself. If they are left subject to the action of the assignees, nothing passes under the deed. (*Boardman v. Halliday*, 10 Paige, 228 ; *Barnum v. Hempstead*, 7 Paige, 572.) Moreover, this provision also directs the payment of moneys which the assignors were not, and never could become, liable to pay.

An insolvent debtor can only assign his property for the benefit of his creditors, and direct it to be applied to the payment of debts due, or which will become due, in consequence of some engagement made by the debtor before

Morrison *et al.* v. Atwell *et al.* .

the assignment. (Burr. Assign., 234.) Any trust in the deed which can possibly interfere with the immediate distribution of the fund among the creditors, vitiates the assignment. (*Dunham v. Waterman*, 17 N. Y. R., 9; *Mead v. Phillips*, 1 Sandf. Ch., 87; Burr. Assign., 204; *Mead v. Phillips*, *supra*.)

II. The provision by which the joint effects of the firm are taken to pay the debts of its individual members irrespective of the claim of each member upon the fund, so that the share of one partner may be taken to pay the debts of the other, to the exclusion of his own creditors, furnishes conclusive evidence of fraudulent intent on the part of the assignees. (*Wilson v. Robertson*, 21 N. Y. R., 587; *Smith v. Howard*, 20 How. Pr. R., 121.)

III. The assignment cannot be helped by extrinsic evidence showing that there were no lands or tenements assigned, or that there was no individual property, and that the assets were not sufficient to pay the copartnership debts. The parties having provided in the assignment for the payment of repts, &c., and for a surplus after payment of copartnership debts, they cannot say there was no real estate, or that there could be no surplus. They are estopped by their deed.

1. It is immaterial whether occasion has arisen for the operation of the illegal powers conferred upon the assignees. The question is, what have the assignors enabled the assignees to do. The law presumes that they intended all that their instrument provides. (*Mead v. Phillips*, *supra*; *Goodrich v. Downs*, 6 Hill, 438; *Collomb v. Caldwell et al.*, 16 N. Y. R., 484; *Barney v. Griffen*, 2 Comst., 365, 371; *Smith v. Howard*, 20 How. Pr. R., 128.)

IV. The assignment being void as to the individual creditors of the assignors, is void as to all. (*Leitch v. Holister*, 4 Comst., 211, 215.)

BY THE COURT — WHITE, J. An assignment was made by the defendants, Berry & Smith, copartners, of all their property, to pay, first, the partnership debts with certain preferences, and then to pay the individual creditors of

Morrison et al. v. Atwell et al.

both partners in full, or *pro rata*, if the surplus was insufficient to pay in full.

The plaintiffs are copartnership creditors, and bring this action to set aside the assignment, on the ground that it hindered and delayed creditors, and was therefore void. They pray, also, for payment of their own debt, &c. On the trial they waived all allegations of fraud except two, viz :

First, that the assignment purported to assign lands, tenements and hereditaments, and directed the assignees to sell and convert the same into money, with all reasonable despatch, and to pay all rents and assessments due, or to become due on said lands, &c., until they were sold; which direction, the plaintiffs allege, delays and hinders creditors, because, being indefinite as to time and amount of payments to be made for those purposes, it wastes the personal property indefinitely, in payments to be made for taxes, rents and assessments for the improvement of real estate, from which nothing may ever be realized for the creditors; and so postpones, hinders and delays creditors, and wrongfully postpones the distribution of the personal estate among them.

Second, that the assignment directs that after all partnership creditors are paid in full, the individual creditors of both partners shall be paid out of the residue of the partnership fund, share and share alike, without making any provision for the application of the fund to the payment of such creditors, in accordance with the right and interest of each partner in the fund. As the assignment stands, the share of one partner in the surplus fund may be applied towards the payment of the individual debts of the other, while some of his own debts may remain unpaid; thus, suppose one partner, A., owes \$100 and the other partner, B., owes \$500. The surplus, after paying copartnership debts, may be \$200, in which the interest of each partner is equal, viz., \$100 for each. The share belonging to A., the partner who owed but \$100, would be just sufficient to pay his individual debt, in full. But under the

assignment, this \$200 of surplus not being sufficient to pay all the individual debts of both partners, in full, it must be apportioned, *pro rata*, among the creditors of both, which disposition of it would leave two-thirds of the individual debts of A. unpaid, thus unjustly diverting two-thirds of A.'s share from the payment of his own debts to the payment of the debts of his partner B.

This would be good ground for an individual creditor to ask that the assignment be declared void, as to the distribution which it ordered of the surplus after the payment of the partnership debts, and the assignee would be ordered, upon such application, to apportion the surplus, after the payment of the partnership debts, to and among the individual creditors of the copartners, according to the rights of the respective copartners in such surplus; or, perhaps a receiver of the surplus (if any surplus there should be) might be appointed, and the individual creditor bringing the action to avoid the assignment, so far as it affected the surplus, might obtain thereby a priority in his own favor as to payment out of that surplus. But it would not afford a ground for setting aside the assignment, as to the copartnership property and the payment of the partnership debts, in which the individual creditor could have no interest, and by which he could not be in any manner affected. Nor would it afford a ground for a partnership creditor to ask that the assignment be declared void, because the individual debts were in no event to be paid until the partnership debts (his included) were paid in full; and this provision respecting the individual debts could neither hinder, delay nor defraud him; and no creditor but one who is hindered, delayed or defrauded by the particular provision complained of, can demand to have the instrument, upon that account, avoided.

And as to the payment of the rents, taxes and assessments that might come due before the lands, &c., should be sold, it is, I think, to be presumed, in the absence of all proof to the contrary, that this provision was intended in good faith for the benefit of the creditors; that it con-

Fettretch v. Leamy.

templated an increase of the fund by the addition of the avails or proceeds of a sale of the real estate, in which case (that is in the event of a sale of the real estate) the rents, taxes or assessments due at the time of sale, must of necessity be paid; and the direction in the assignment to sell with dispatch, shows that it was not intended to hold the real or leasehold estate unreasonably, or so as to produce a waste or exhaustion of the personal, but that the design was to sell it forthwith.

And I think the assignment being made by the copartners, and purporting to convey all their property, assigned only that which was the joint partnership property, and not any of their individual property. It did not, therefore, convey the leasehold estate of the partner Berry in his private dwelling house, and consequently, when the assignment directed the application of the copartnership funds to the payment of rents, &c., it only directed their application to the payment of copartnership rents, and not to the individual rents due, or to come due, for the partner Berry's house.

The judgment should therefore be reversed, and the plaintiff not claiming to show any other frauds or reasons for avoiding the assignment than those above considered, judgment should be rendered for the defendants, with costs.

Judgment accordingly.

WILLIAM FETTRETOH, Plaintiff and Respondent, v. JEREMIAH LEAMY, Defendant and Appellant.

1. Under a covenant, in an executory contract, for the sale of a lot of land, by the vendor, to erect upon an adjoining lot, along the boundary line between the two lots, a wall, and to grant and convey to the purchaser the right to use such wall in the erection of a house on the lot so agreed to be sold to him, and "for that purpose to insert the beams thereof into such wall, to the extent of four inches," and two chimney backs to the like extent, and "to keep and maintain such beams and chimney backs therein, so long as such wall should stand," such wall "to be a party wall between

Fetters v. Leamy.

the two houses to be built" on such two lots, the contract containing also, in terms, a present grant of such easement in such wall to be built:

Held, that the purchaser did not acquire thereby a right to use such wall in any other way than that so specified; and that he was not entitled to prolong the lintel course of his front wall, across the boundary line of such two lots, so as to enter into the front wall of the vendor's building at the point or line where those walls, meeting, adjoined the party wall.

2. If the vendor erects on such adjoining lot a wall along such boundary line, more extensive than by the terms of such agreement, he is bound to do, although he refuses, to allow the purchaser to use it as a party wall, pursuant to such terms, no increased stability or value which a building, erected by the latter on the lot so bought by him, would have derived from such use, if permitted, or increased expense of making such building equally stable and secure by other means, arising from not being allowed so to use it, form proper elements in estimating the damages of the purchaser, by such refusal, and it is error to admit evidence thereof, as such. (Per ROBERTSON, J.)
3. The term "party wall," when used in such an instrument, without restrictive terms, and in its general ordinary signification, means a dividing wall between two houses, to be used equally for all the purposes of an exterior wall, by both "parties," that is, by the respective owners of both houses. This use, in its full, unrestricted sense, embraces not only the use of the interior face or side of the wall, but also such use of it as is necessary to form a complete and perfect junction in an ordinary good mechanical manner, between it and the other exterior walls of the house. (Per WHITE, J.)

(Before ROBERTSON, WHITE and BARBOUR, J. J.)

Submitted June 16, 1862; decided October 11, 1862.

THIS action was brought to recover damages against the defendant for interfering with the use by the plaintiff of a wall standing upon the land of the former, adjoining the land of the latter.

In the year 1860, the defendant owned in fee three lots of land 100 feet deep, adjoining each other, situate at the corner formed by the intersection of the southerly side of Fifty-fifth street and easterly side of Third avenue, in the City of New York; two of the lots being 25 feet wide, and the remaining corner one five inches wider. In that year, on the 27th of September, the parties to this action entered into an agreement under seal *inter partes*, wherein the ownership by the defendant of such lots, as laid down on a diagram annexed and numbered 1, 2 and 3, was recited. By it the defendant, in consideration of

Fettretch v. Leamy.

the plaintiff's covenant therein contained, agreed to convey to him for a certain price, to be paid partly in cash, partly on the delivery of the deed, and partly by mortgage, the lot designated on such diagram as No. 3; and also immediately to erect a wall on the south side of lot No. 2, so as to adjoin the northerly side of the lot so sold to the plaintiff; such wall to be 50 feet deep eastwardly from the easterly side of the Third avenue, and to be "four stories high above the sidewalk; that is, high enough for a four story house." The defendant also, by such agreement, covenanted that he should grant and convey, and he did thereby grant and convey to the plaintiff, the right "to use such wall in the erection of a house" on the lot so agreed to be sold to him, and "for that purpose to insert the beams thereof into such wall to the extent of four inches," and two chimney backs to the like extent, and "to keep and maintain such beams and chimney backs therein, so long as such wall should stand;" such wall "to be a party wall between the two houses to be built" on such two lots Nos. 2 and 3. The defendant further thereby covenanted not to pull down such wall, or do any act tending to its destruction. He also thereby agreed to deliver, on the 27th of October following, to the plaintiff, a full warranty deed of lot No. 3 so sold, free from all incumbrances except the mortgage, upon receiving a certain sum, and to pay the plaintiff any damages he might sustain in building before that time, and the expenses of searching the title, in case it should prove defective. It was also declared therein that these covenants should run with the land and bind the parties, their heirs and assigns.

The defendant and his wife, on the 27th of October, 1860, delivered to the plaintiff a deed, executed by them, of lot No. 3, in which it was declared that it was made pursuant to the agreement of September previous; and that "all the covenants and agreements therein contained relating to the party wall therein mentioned and the right to use the same, and all other covenants not necessarily satisfied by such deed and the payment of the purchase-

Pettretch v. Leamy.

"money," were "to continue and be obligatory upon the respective parties thereto according to the tenor thereof."

The complaint in this action, after setting forth the making and contents of the agreement of September, 1860, alleged the performance by the plaintiff of all his covenants therein, and the execution to him on the 27th of October, 1860, by the defendant, of a deed of the lot in question, wherein the latter did for good consideration agree, that such "wall should remain forever a party wall between the plaintiff's and defendant's lots, and that the former could use it in the erection of the building on his lot, as fully and to the same extent as if it were a part of and erected at the same time as the walls" of such building. It then averred, that on the 29th of September the plaintiff commenced a four story building on his lot, and completed it in March, 1861; and that in the course of such erection the defendant "wholly prevented the plaintiff from using such wall as a party wall, for the erection of the front wall of such building, and hindered the plaintiff from joining any portion of such front wall with or upon the front portion of such party wall" as it was necessary, for the safety and permanence of such building, for the plaintiff to do; and further, that by reason of such acts of the defendant, the plaintiff was compelled, at great inconvenience and expense, as well as loss of time in the completion of his building, to lay other and separate foundations, and erect thereon other separate supports, by which to sustain the northerly end of the front wall of his building; and although such work was done in the best possible manner to make such building secure, yet by reason of such front wall being separated from such party wall, it was less secure, permanent and strong than it would otherwise have been; also, that, in consequence of the necessary occupation of the basement doorway by such foundation and support, it was rendered inconveniently narrower than it otherwise would have been, whereby the value of such building and property was

Fettretch v. Leamy.

diminished; and the plaintiff claimed such damage to amount to \$1,000.

The answer of the defendant admitted the agreement of September, but took issue in the existence of any such covenants in the deed, by him, to the plaintiff; also, upon the allegations of the complaint, as to his hindrance of the plaintiff from using the wall as a party wall, or from using any portion of the front wall of his building with the front of such party wall; also, upon the necessity, in consequence of any act of his, of laying foundations and erecting supports, to sustain the northerly end of such front wall; also, upon the inferior security or permanency of the front wall of the plaintiff's building, by reason of its separation from the party wall; also, upon the narrowing of the doorway, by the foundations and supports, and generally, any diminution in value of the plaintiff's building.

The action was referred to Orsamus Bushnell, Esq., as Referee, to determine the issues therein. He reported in favor of the plaintiff, and found, as matters of fact,

1st. The making of the contract to sell the lot in question, as stated in the complaint.

2d. A conveyance of such lot to the plaintiff by the defendant, by a deed, but only with such provision as to the continuance of covenants, as is herein above stated.

3d. The erection of a four story building by the plaintiff, on the lot so conveyed to him, and the obstruction by the defendant, of the plaintiff, "in the way of his using the front of the party wall, built by him as a party wall, for the erection of the front wall of the plaintiff, and his refusal and hindrance of the latter from joining any portion of the front wall of his building within or upon the front of such party wall."

4th. A usage, and, for the safety and permanence of such a building as the plaintiff's, a necessity, to exercise the rights of using the front of such a party wall, by tying therein.

5th. A compulsion on the plaintiff, by reason of such hindrance by the defendant, to erect, and his erection of

Fettretch v. Leamy.

other and separate foundations and supports for his front wall, on which to sustain the northerly end of such front wall, at considerable expense, inconvenience and loss of time.

6th. Notwithstanding the proper erection of such foundations and supports, inferior security, permanence and strength of the plaintiff's building, by reason of his not being permitted to rest it, and actually resting it, on the front of such party wall, the narrowing and inconvenience of the entrance doorway to the basement thereby, and the inferior value of the building to what it would have been if the plaintiff had been permitted "to use the front of such party wall, by resting the front of his wall upon it, in the usual way."

7th. Damage to the plaintiff, by such acts of the defendant, to the amount of \$1,000.

The conclusions of law of the Referee were :

I. That the defendant is chargeable with the breach of the contract so made by him, in refusing and preventing the use of the front of such party wall, by the plaintiff.

II. That the defendant owes the plaintiff one thousand dollars, as damages for such breach, with interest, from the date of such report.

The defendant excepted to the third, fourth, fifth and sixth findings of fact in the report of the Referee, by written exceptions, duly filed.

On the trial it appeared that the plaintiff commenced building on his lot the day after the contract. The defendant had previously begun to build on his, and had completed the side and front walls so far as to have finished a brown stone lintel on the first floor of the latter, extending to the line of the plaintiff's lot; the plaintiff then undertook to cut off four inches in length, of such lintel, in order to have the lintel of his front wall extend that distance beyond the dividing line of the lots, and lap over that part of the defendant's building which belonged, in common, to its front and side wall; the defendant resisted the attempt, and the plaintiff abandoned it. Evidence was also given

Fettretch v. Leamy.

to show that the defendant verbally forbade the plaintiff's putting in anchors in his front walls, and interlocking the bricks of the front walls of both buildings, at their junction; but never otherwise prevented him from doing so. The evidence was contradictory as to the fact of insertion of anchors and tying the front walls of both buildings together, by interlocking the bricks.

No evidence was given as to the meaning of the term "*party wall*," as used by builders, or owners of, or dealers in real estate, or to show that it had acquired any technical signification beyond its ordinary one. Evidence was, however, introduced, of the practice of builders, in connecting front walls of adjoining houses, when the dividing wall was a party wall; but it was conflicting as to the usage, when such party wall stood entirely on one person's land, and the other had a mere easement in it, or privilege of using it. Evidence was also given to show the superiority in firmness, appearance and convenience of the mode of uniting the walls, attempted by the plaintiff and opposed by the defendant. The plaintiff testified as to the impossibility of making his building secure, without being aided by the support of the wall, intended as a party wall. Upon that point the testimony was conflicting.

A number of witnesses, builders, dealers in real estate, and persons conversant with party walls, were examined as to the custom, under an agreement, such as that of September, 1860, in all its parts, after reading or stating them to such witnesses, of resting a part of the lintel course of the building of the party having the privileges therein granted, upon the adjoining wall, by cutting a place therein. They differed widely in their views of the custom, generally admitting, however, that they had never seen a similar agreement; and many were more influenced in their testimony by the grant of the privilege of inserting beams four inches, than by the wall being described as a party wall. Two of the plaintiff's witnesses, (Haldrich and Duffy,) testified that they did not consider it as a full

Fettretch v. Leamy.

party wall agreement, but simply as one to use four inches of the party wall.

Evidence was both admitted and excluded as to the negotiations between the parties before the execution of the agreement of September, 1860, to which exceptions were taken. Evidence was also given to show the inferiority of the plaintiff's building, by reason of his not having been allowed to insert the lintel course of his front wall in the front part of the defendant's front wall, and consequent damage to its value. Questions were twice put to the defendant as to preventing the plaintiff from connecting the two front walls, which were excluded; but upon what ground does not appear. A question as to the cost of connecting the walls, at the time of the trial, was excluded, and exception taken thereto.

W. R. Stafford, for defendant, appellant.

I. The agreement of the defendant was, not to build a party wall, but that the wall when erected should then remain a party wall.

He built the wall, and would have been liable to an action for non-performance, if he had not extended it to the front line of his lot. Until so erected, the plaintiff had no right to touch it, except to insert beams and chimney-backs, as specifically reserved by the agreement; and any other interference by him, however careful, would have been a trespass. (*Eno v. Del Vecchio*, 6 Duer, 17.)

II. The evident intent of the parties at the time the agreement was made, was so to restrict the immediate use of the wall. In construing a covenant, it must be considered with the context, and performed according to the intention of the parties as derived from both. (*Marvin v. Stone*, 2 Cow., 781; *Bull v. Follett*, 5 Id., 170; *Roberts v. Roberts*, 22 Wend., 140.)

The situation of all parties and the subject matter are to be considered. (*Wilson v. Troup*, 2 Cow., 195.)

III. The plaintiff cannot claim the benefit of any forced construction of the agreement in his favor. It cannot be

enlarged by parol testimony, and the evidence tending so to do was clearly erroneous.

The right claimed by plaintiff to enter upon the defendant's front wall, and occupy it for a permanent purpose and for an indefinite time, cannot be created otherwise than by a conveyance sufficiently explicit to carry a freehold. (*Broken v. Woodworth*, 5 Barb., 551; *Houghtaling v. Houghtaling*, 5 Id., 379; *Mumford v. Whitney*, 15 Wend., 380; 6 Hill, 61; 4 Johns., 81.)

IV. The agreement, in the first instance, merely conferred a license to use for specific purposes. The easement could not take effect until the houses were finished. (*Giles v. Dugro*, 1 Duer, 331-333.)

V. The plaintiff was in no way prevented from connecting his front with the wall, except by the refusal of defendant to allow him to cut off four inches of the lintel in question, and carry plaintiff's lintel across; and the front was in fact properly tied to the side wall, although the defendant did not covenant to support the front. There was, therefore, no such breach of the agreement as to authorize an action against the defendant. (*Palmer v. Fort Plain, &c., Co.*, 1 Kern., 381-388; 25 Wend., 367, 368; 1 Denio, 513.)

VI. There was no evidence upon which to base any claim for the damages awarded by the Referee. The true rule would have been, what it would have cost to place the parties in the same position as required by plaintiff's version of the contract, but that was excluded by the Referee.

VII. The plaintiff could not justify the proposed trespass by him by evidence of custom. (4 Duer, 61.)

VIII. Having allowed plaintiff to go into proof as to custom, the Referee erred in not permitting defendant to contradict it by similar evidence.

IX. The testimony wholly failed to establish any definite custom on the subject.

X. The Referee erred in many of the minor questions

arising on the trial; and to such an extent as to clearly entitle the defendant to a new trial.

XI. The defendant's motion to dismiss the complaint should have been granted, for the reasons assigned; and as it is submitted that the plaintiff has, on the entire evidence, failed to make out any cause of action, the judgment should be reversed and judgment of nonsuit ordered.

T. B. Barnaby, for plaintiff, respondent.

I. The pleadings substantially admit the plaintiff's right, under the agreement, to use the front portion of the party wall, as well as the interior portions of it for the purposes and uses of a party wall.

This wall so to be built, beginning at the avenue line and running back 50 feet, just the depth of both houses, is necessarily a party wall to the outside front and rear line; whereas the defendant mistakenly supposes, by his theory, that the party wall stops on the inside of the front and rear walls.

II. The Referee has found in favor of the plaintiff, upon all the facts necessary for the recovery of the damages, as reported by him.

III. The defendant's exceptions to the Referee's report are too general, being to the whole and not to any specified part. (*Willard v. Warren*, 17 Wend., 257; *Whiteside v. Jackson*, 1 Wend., 418.)

IV. The Referee's conclusions of law are correct, as stated in his report. 1st. The plaintiff had a right to the use of the front portion of the party wall, to the depth at least of four inches, so as to rest his front wall upon it in the manner usual in erecting buildings. (a.) The natural meaning of the first part of this covenant is not narrowed down or restricted by the clause as to beams and chimney backs. The copulative conjunction forbids that view. If restricted at all, the restriction is confined to the question of how deep the beams and chimney backs may be inserted.

The last clause is general: "The said wall to be a party

wall." It applies to the whole extent of the wall, fifty feet deep from front to rear, and this necessarily includes the part to which plaintiff's front should have been attached. It is meaningless unless the wall is to be a party wall in the broadest sense.

The entire scope and evident intent of the whole agreement, together with the deed, give the same construction.

Whatever may be fairly implied from the terms or language of the instrument, is in judgment of law contained in the instrument. (*Rogers v. Kneeland*, 10 Wend., 218. As to the rules of construction, see *Wilson v. Troup*, 2 Cowen, 195; *Bull v. Follett*, 5 Cowen, 170; *Potter v. Bacon*, 2 Wend., 583; *Willard v. Tillman*, 2 Hill, 274.)

By this agreement and deed the plaintiff acquired more than a mere license to insert beams and chimney backs; he acquired an easement in the wall as long as it shall stand, founded in positive grant, and assignable. (*Webster v. Stevens*, 5 Duer, 553; 3 Kent, 452; *Miller v. Platt*, 5 Duer, 277; 4 Id., 53.)

When there is any doubt what construction to give to the language of a contract, the words and covenants are to be construed most strongly against the grantor. (3 Comst., 256; 3 Johns., 387.)

(b.) The very necessities of the case, and the safety, convenience, comfort and beauty of a building require this construction, or otherwise the plaintiff must have foolishly agreed to have no wall against which his front should be secured.

(c.) The building or fire law, which is presumed to have been in the contemplation of the parties, necessarily presupposes that in every building the front wall and side wall shall lap over each other, making a sharp corner, and requires in addition that the front be secured to the party wall, either by building or interlocking the brick work together, or by tying iron anchors across the full width of the party wall into the middle portion of the front wall,

Fettretch v. Leamy.

and these anchors not to be more than six feet apart. (Laws of 1860, 905, ch. 470.)

(d.) The prevailing custom, as proved and found by the Referee, admits of no other mode of erecting a front wall.

(e.) The acts of the defendant, permitting the rear wall of plaintiff's house to be built into the party wall, are consistent only with this construction. If the rear, why not the front also? (*French v. Carhart*, 1 Comst., 96; *Giles v. Comstock*, 4 Id., 270.)

2. This being so, the Referee finds, as matter of law, that rightly defendant is chargeable with the breach alleged. (*Voorhies v. Anthon*, 5 Duer, 182.)

3. His finding, as to damages, was correct. (*Derwint v. Wiltsie*, 9 Wend., 325; *Freeman v. Clute*, 3 Barb., 426; *Griffin v. Colver*, 16 N. Y. R., 489; Sedg. on Dam., 71, 98, 112; *Kane v. Sanger*, 14 Johns., 89; *Giles v. O'Toole*, 4 Barb., 261.)

Where, as in this case, the defendant has maliciously or wantonly violated his contract, or has done so under aggravated circumstances, the damages may be increased. (Sedg. on Dam., 35.)

The Court will exercise the power of awarding a new trial very cautiously when the error relates only to the amount of damages. (*Krom v. Schoonmaker*, 3 Barb. S. C. R., 647.)

V. The Court will not presume error in law or fact, not apparent on the report. (Rule 13 of the Superior Court.)

VI. The Referee has not erred in ruling upon the admission of testimony.

ROBERTSON, J. If the case stated in the complaint had been made out in evidence, the plaintiff would have established a complete cause of action; but the deed to the plaintiff, on being produced, is found to contain no such covenant as is stated in that pleading. It simply reserved whatever rights had been acquired under the covenants contained in the instrument of September previous, relating to the party wall therein mentioned, and the right to

Fettretch v. Leamy.

use the same, and continues their obligatory force. From that September instrument alone, the plaintiff derives his right to sue. The action is framed upon a supposed breach of some covenant, and the Referee has reported as matter of law that the defendant is chargeable with the breach of the contract so made by him, in preventing the use of his front wall by the plaintiff, and that the damages from such breach amount to one thousand dollars. This renders it necessary to examine what such covenants are: In the first place, there is no such covenant in the September agreement as to permit the plaintiff to use the party wall at all; there is one, to grant an easement in the premises on which it was to stand and render them the servient tenement, while the plaintiff's lot was to be the dominant one. It was an executory contract to convey a right, not a mere covenant that such right might be exercised. Until that covenant was specifically performed, no right arose to use any part of the wall. It is true such instrument purported actually to grant such right, but the plaintiff had not then acquired the title to the land to which it was to become appurtenant. (Gale & W. Law of Easement, 5; *Wolfe v. Frost*, 4 Sandf. Ch., 72.) An instrument in the form of a covenant has been held to be a grant, (*Barrow v. Richard*, 8 Paige, 351; *Birdsall v. Tiemann*, 12 How. Pr. R., 551; *Keteltas v. Penfold*, 4 E. D. Smith, 122;) but I am not aware of any decision holding the converse. The agreement for the grant of the easement was substantially a part of the contract for the conveyance of the land, and should have been performed along with it. The easement would thus have been created, (*Webster v. Stevens*, 5 Duer, 553; *Miller v. Platt*, Id., 277;) and the plaintiff's action could only have been for a disturbance of a vested right, not for violating a covenant. Possibly, however, the plaintiff may have a right to unite an action for specific performance with one for injury done to the rights which would have been his, if the contract had been performed originally, on the principle that equity will consider as done what ought to have been done. This action

Fettretch v. Leamy.

might, therefore, be maintainable on proper pleadings, which renders it necessary to examine the evidence and findings in this case.

Two things are observable as apparent on the face of the instrument of September, 1860; one is entire silence respecting the materials, structure or dimensions of the wall to be erected by the defendant, according to its terms, except its length and height, and, perhaps, four inches of thickness. Another is, that the easement was to be confined to that wall when erected, and cease with its existence. Had the defendant not built any wall, it would have been difficult to estimate what damages, under a contract so vague, the plaintiff would have sustained. Can he now recover damages to be measured by the character of the wall the defendant has actually put up, when he might have preferred not to have used such a wall as the defendant might have erected so as to be within the terms of the contract? Suppose the defendant had put up a wall twice the thickness of the present one, could the plaintiff have recovered damages commensurate with the increased stability which a connection of his front wall with such a wall would have given to his building? Yet part of the evidence in this case was given to show the advantage to the plaintiff of tying the two walls together, in the stability of his house, which, of course, entered into the consideration of damages. Again, nothing is said in the agreement of the kind of house the plaintiff was to build. Was he at liberty to build a palace or any other costly building, and claim damages for injury to such a building by the defendant's refusal to allow him the front of his for a support? Yet the evidence was directed to the injury to the particular building; some of the witnesses testified, that the kind of connection of the walls desired by the plaintiff was only proper in case of a store, and estimates were made of losses of rent and the like, by reason of the appearance of the building in such case.

Again, the damages for breach of covenant, for not permitting the use of a wall, would be recoverable, but once.

Fettretch v. Leamy.

The estimate of the whole future injury must be then made. For disturbance of an easement the injury is continuous, and each successive act of hindrance is a subject of suit. (*Blunt v. McCormick*, 3 Den., 283.) The plaintiff in this case has been clearly awarded damages for injury for all future time, and particularly for that supposed to arise from a necessary and compulsory change in the character of his building.

The defendant had begun to build the wall in question before making the September agreement, and no time was limited therein for commencing its use by the plaintiff. The time of granting the easement being left entirely undetermined by the instrument, was apparently to be determined by the giving the deed or finishing the wall; probably the former, as provision is made for reimbursing the plaintiff for any expense to which he should be put in building, in case the title proved defective. It is therefore a matter of some doubt whether, until the time when the deed should be delivered and the plaintiff thereby acquired the easement, he could exact the use of the wall.

But even if the grant of such easement had been executed before the acts of the defendant complained of were committed, it is by no means apparent from the face of the instrument of September, that either they or those set forth in the complaint would have been a violation of such easement. That was a right to use the wall in question in the erection of the plaintiff's building, and for that purpose to insert beams to be kept there forever; such wall to remain a party wall. The first branch would only imply a temporary use, were it not qualified by allowing the beams to remain. That, however, gives no right beyond the terms of the contract, and unless the lintel course could be construed to be a beam, the plaintiff had no right to insert it in the defendant's wall.

It is not a matter of judicial cognizance that tying front walls together is a part of the use of a wall as a party wall, if that be part of the plaintiff's right, and it requires to be established by evidence. It is not in evidence, in

Fettretch v. Leamy.

this case, even how much of the corner of a wall belongs to a front and how much to a side wall when they unite. It must be a matter of practical construction. It would not follow that the plaintiff had a right to insert beams anywhere, because there was no limitation of the place. Unless a lintel course therefore be a beam within the meaning of the contract of September, the first part of the right granted has not been assailed. What the legal rights and burdens of a party wall are, or even its definition, is as yet scarcely settled definitively. The term is commonly applied to a wall, of which, if divided longitudinally, the two parts rest on land belonging to different owners, built solidly of materials not easily divided, or whose parts cannot be taken down without danger to the whole structure. In such case either party may remove the half on his own land, if it does not injure the other's half, unless one or other owner has an easement by grant to have his neighbor keep up his half to support his own. (*Sherred v. Cisco*, 4 Sandf., 480; *Eno v. Del Vecchio*, 4 Duer, 53; 4 Man. & Gr., 714; 2 Car. & P., 250.) Walls, however, built entirely on one man's land may acquire by grant the characteristics of party walls. (*Brondage v. Warner*, 2 Hill, 148.) In such cases the rights of the parties must depend exclusively on the character of the grant.

In so large and old a city as New York, to designate a wall as a party wall, may possibly, by usage, communicate to it certain attributes derived from the understanding and customs of builders and those dealing in the sale of real estate with buildings erected thereon. But in this case no distinct evidence was given that the term "*party wall*," had acquired any peculiar significance beyond its ordinary meaning, although there was an attempt made to prove what, by custom, were the rights of parties interested in a "*party wall*." The latter was abandoned in order to prove, by witnesses, under their understanding of the contract whatever that might be, what were the rights of each party under supposed customs. No interpretation of the agreement was given to them as a guide; conse-

Fettretch v. Leamy.

quently, as might have been expected, their testimony was widely variant. Most were influenced by the consideration that the agreement gave a privilege of inserting beams and chimney backs at the depth of four inches, with which the injury complained of had nothing to do, unless a lintel course was a beam within the meaning of the contract. Some read it as a permission to use the dividing wall in question generally as a party wall in the erection of the plaintiff's building, although for that purpose it was limited to be used in a particular manner; many reduced the privileges given by the contract to one, compounded of all, to wit, to use the wall as a party wall in erecting the plaintiff's building, and, as such, to insert beams and chimney backs penetrating to a certain distance; whereas, the two rights are kept separate in the original instrument. None testified that, according to any usage or understanding of trade, a right to cut into a part of a front wall which formed the continuation of a side wall, and was common to both where they united, followed the conversion of such side wall into a party wall. Such testimony might have formed an important part of the case. What was actually received was improper, in allowing the witnesses to determine the legal effect of the agreement, and evidently had strong influence upon the mind of the Referee.

The right of the plaintiff to cut into such wall, as affected by custom, is the more important, as the place where it was to be done was not prescribed by the agreement. That his lintel course corresponded with the defendant's was a mere matter of accident. He might have chosen to make it higher or lower, and he would have had the same right to cut into the brick work as he claimed in regard to the stone work. Indeed, from the testimony of some of the witnesses, the whole of such right would seem to have depended entirely on the kind of building he erected. As it was, the testimony was conflicting as to the right to cut into brick work. This right, too, of cutting into the defendant's front wall, of course, would

Fettretch v. Leamy.

have remained as long as the wall stood, and might be enforced at any time.

The witnesses on the trial divided on the question whether the right was the same when the ground on which the wall stood, or any part of it, was not conveyed but only a privilege to insert beams given; the weight of testimony being rather that in the latter case no such right existed. But no one undertook to testify how far a grantee might penetrate the wall in case it was merely made a party wall and nothing was said about its thickness. They seem to have assumed it was to be to the depth of one-half the thickness; evidently looking at cases where different parts of the width of the wall stood on adjoining land of different owners. It should clearly have appeared whether the right of cutting off part of the defendant's lintel arose from that of inserting beams, or followed the conversion of a wall into a party wall. It is impossible, therefore, from the testimony to discover of which right the defendant's supposed delinquency was a violation. The Court is at liberty to determine from the evidence only whether it sustains the complaint. The evidence in this case does not sustain the charges, either that the defendant's acts were an obstruction to the use of the wall as a party wall, or that the junction of the plaintiff's front wall with the front wall of the defendant was a use of the side wall as a party wall. It is true that the evidence tends to establish that such junction was useful to the plaintiff and rendered his building more stable, but unless the defendant agreed he should make it so by that means, it is immaterial.

Much of the evidence was employed in establishing that the mode in which the plaintiff built his house was the best possible mode of securing it, if he could not fasten his front wall to the adjoining house. This is entirely immaterial. The plaintiff was also permitted to prove, as a measure of damages, the difference of value in his house, in case he had been allowed to use the adjoining front wall of the defendant's. This I think was erroneous. The

Fettretch v. Leamy.

damages should certainly be the same to every man on the same covenant. *Non constat* but the plaintiff built his house to enhance the damages. But if not, it was erroneous to prevent the defendant from proving what it would cost to place the plaintiff's house in the same condition in which it would have been, had the defendant not interfered with him. The exclusion of the question to the defendant, whether he had ever prevented the plaintiff from tying the walls together, except by prohibiting his cutting out the four inches was clearly erroneous, since it went directly to contradict the testimony of the latter. No reason is furnished for its exclusion. No objection was made that it was leading and had been answered before, as the plaintiff's counsel supposes. Evidence had been given to prove other interference by the defendant, and he had a right to deny it under oath. This would be sufficient cause for sending the case to a new trial, but the other reasons of more importance in the admission of testimony, require a re-examination of the cause.

The judgment must therefore be reversed, and a new trial had, with costs to abide the event, the order of reference to be discharged.

WHITE, J. The agreement and grant of the defendant, upon which this action is brought, and by the terms of which he agreed to build a wall of the depth of fifty feet, and of a height above the sidewalk sufficient for a four story house, on his own lot of land, adjoining the northerly line of the plaintiff's lot, and whereby, also, he granted to the plaintiff the right to insert the beams of his (the plaintiff's) intended building four inches into said wall, and to insert therein two chimney backs to the same depth, and to maintain such beams and chimney backs so long as said wall should stand, covenanting that he would do no act tending to the destruction of said wall, and declaring that said wall should be a party wall between the houses which plaintiff and defendant were respectively about to build on their said two adjoining lots,—is very

Fettretch v. Leamy.

vague in some particulars, such as the character or description of the plaintiff's building to be erected, and of the intended party wall; but still I think, that the instrument is capable of some reasonable construction and enforcement, and that an action might be maintained upon it in a proper case, at the suit of the plaintiff.

Taken in connection with the requirements of existing public law on the subject of the erection of buildings in the City of New York, and the circumstances of place and business, the terms of the defendant's covenant become sufficiently intelligible. The law requires that a party wall, or any exterior wall of a house in the City of New York, of a height such as a four story house must necessarily be, must not be less than twelve inches in thickness, and it further requires, that the beams shall be inserted to the depth of four inches in the wall, and that there shall be at least four inches in thickness of brickwork between the ends of the beams inserted in the wall upon each side. From these prevailing regulations, it can be properly deduced, that the party wall contracted for in this case, was to be at least twelve inches in thickness. And, as to the character of the plaintiff's building to be erected, if the construction should be adopted, that the house should be one of a character not exceeding in value the best class or description of buildings erected in the immediate neighborhood mentioned in the contract, it would be a construction of which the defendant could not justly complain, as it would be a reasonable one, and the legal rules applicable in such a case would warrant, that any difficulty arising from ambiguity or absence of express terms, should be solved in a manner the least favorable to him. Such a construction should also be entirely satisfactory to the plaintiff, as it would secure to him indemnity, by furnishing him with a basis as favorable as he could reasonably demand for the calculation of damages, in case any damages should appear to have been sustained.

With respect to the rights acquired by the grantee under the defendant's deed and covenant, I think, that the term

Petrovich v. Leamy.

"party wall," when used in such an instrument, and in its general ordinary signification, means a dividing wall between two houses, to be used equally, for all the purposes of an exterior wall, by both "parties;" that is, by the respective owners of both houses. This use, in its full, unrestricted sense, embraces not only the use of the interior face or side of the wall, but also such use of it as is necessary to form a complete and perfect junction in an ordinary, good, mechanical manner between it and the other exterior walls of the house.

This, I think, is a correct definition of a "party wall," and of the rights which the grant of an unrestricted use of it confers upon the owner of the house of which it forms, or is to form one of the exterior walls; and the right of the grantee of such unrestricted use would be the same whether the wall stood one half upon the land of one owner and one half upon the land of the other, or stood wholly upon the land of the grantor of the unrestricted use. This right can, of course, be restricted or limited by the terms of the instrument granting it; but if no restrictive words are employed, and if the grant to an adjoining owner is in its terms simply a grant of a right to use a wall as a "party wall," then his right to its use for the purposes of an exterior wall for his building or erection, is as full and ample as is the right of the grantor to its use and benefits for the purposes of an exterior wall for his building.

Entertaining this view of the agreement of the parties, and of the force and meaning of the word "party wall," I am inclined to the opinion that the Referee, upon the testimony received by him, came to a correct conclusion in this case, upon the question of a violation of contract by the defendant; and if, in every other respect, the proceedings before him were satisfactory, I would not feel disposed to order a new trial, either upon account of this conclusion, or of the amount of damages awarded. And in this connection I will say, that the evidence given by the plaintiff, to show that he had built his house as well

Fettretch v. Leamy.

as it could have been built while deprived by the defendant of the right to connect his front wall with, or to rest it upon the party wall, appears to me to have been properly received; and, on the other side, that the testimony offered by the defendant with the intent to contradict that evidence, was improperly rejected.

As, however, the term "party wall," and the rights which the owner or grantee of its use acquires by mere force of the employment of that term in a grant or covenant, have never, I believe, been judicially defined, and as a true understanding of them may be materially aided by intelligent and well directed testimony, which does not appear to have been produced upon the trial that has already taken place in this cause, the witnesses on the trial having been left without any authoritative interpretation of the contract by the Referee, to aid them in the formation of the opinions which they were required to give, and also inasmuch as some testimony offered by the defendant was improperly excluded, especially the testimony of the defendant himself, on the question whether he had prevented the plaintiff from connecting his front wall with the party wall,—I fully concur in the propriety of reversing the judgment and ordering a new trial, with costs to abide the event, the order of reference to be discharged if either party desires it; the proceedings upon such new trial to be governed by the principles herein indicated.

BARBOUR, J. I concur in the conclusion to which my brethren have arrived, upon the ground that the party wall which the defendant covenanted to erect, was to be used by the plaintiff only to the extent, and in the manner, particularly specified in the agreement; that is, he was to use it for the purpose of inserting the beams of his house to the extent of four inches, and, also, of inserting two chimney backs to the same extent. No other privilege to use the wall was covered by the covenant; anchors are not named, and are, therefore, excluded. *Expressio unius est exclusio alterius*. So, for the same reason, as to the right

Van Blarcom *et al.* v. The Broadway Bank.

claimed by the plaintiff to lap his front over or upon the wall. The fact, too, it may also be said, that the defendant covenanted to erect the wall from the easterly side of the avenue, fifty feet in length, is quite inconsistent with the latter claim; as a perpendicular wall, built upon the line of the street, would leave no space in its front extremity for the insertion of other bricks. He was bound by his covenant to build it flush with the line of the street, and the plaintiff accepted that covenant.

Judgment reversed, and a new trial ordered. ✓

**JOHN A. VAN BLARCOM *et al.*, Plaintiffs and Respondents,
v. THE BROADWAY BANK, Defendants and Appellants.**

- The Broadway Bank loaned money to C., for which they received from him a pledge of stocks as collateral security. They also discounted several notes for him, and received from him a draft on a distant place for collection. Before it was known whether the draft was paid or not, he applied to the president of the bank, saying that he must have the proceeds of the draft immediately or must suspend payment; and the president asking for collateral security, he answered, "The bank holds all my stocks, and they are security for all my discounts and this draft," to which the president replied, "If that is so the bank will put the proceeds of this draft to your credit," which was thereupon done.

Held, that this was a pledge *in presenti* of the stocks, as security for all the discounts which had been made for C., as well as for the draft in question. (ROBERTSON, J., dissented.)

(Before ROBERTSON, WHITE and BARBOUR, J. J.)

Heard, June 13; decided, October 11, 1862.

APPEAL from a judgment entered upon the report of Hamilton W. Robinson, Esq., to whom the issues in the cause were referred for trial.

The plaintiffs, John A. Van Blarcom and Oliver J. Hayes, became assignees of certain stocks of one Christopher Champlin, which, at the time of the assignment, were under pledge to the defendants as collateral security for liabilities of said Champlin to the defendants, and were in their possession. The defendants sold these stocks,

Van Blarcom *et al.* v. The Broadway Bank.

with the knowledge and assent of the plaintiffs, and recognizing their title to the same, and the plaintiffs brought this action for the surplus of the proceeds of the sale, after satisfying the debts of Champlin for which they had been pledged. The defendants admitted the sum of \$152.13 to be due the plaintiffs, and the plaintiffs claimed the sum of \$10,175.46 as due, besides interest. The question in dispute, was, as to what liabilities of Champlin were covered by the pledge of these collaterals. The Referee found there was due from the defendant to the plaintiffs the sum of \$7,100.87, with interest, and judgment was entered accordingly. The defendants appealed to the Court at General Term.

David E. Wheeler, for defendants, (appellants.)

Cited, as to the sufficiency of the pledge, as a security for the discounts as well as for the draft, 2 R. S., 136, § 3; Code, Voorhies' ed., note to § 111; *Oneida Bank v. Ontario Bank*, (21 N. Y. R., 490;) *Dickenson v. Phillips* (1 Barb. S. C. R., 454, 458;) *Bradley v. Root*, (5 Paige, 632, 641;) *Archer v. Zeh*, (5 Hill, 200;) Willard Eq., 463.

William M. Evarts, for plaintiffs, (respondents.)

Urged that the evidence sustained the Referee's finding on the question of pledge, and, moreover, there being a conflict of testimony, the report should not be disturbed.

BY THE COURT—BARBOUR, J. The case shows that prior to the 27th of February, the Broadway Bank had loaned to Champlin, the plaintiffs' assignor, moneys at several times, for which the bank then held Champlin's stock notes, payable on demand, and secured by sundry shares of stock named in the notes, as well as another note of Champlin for \$2,750 payable on demand, secured, collaterally, by a three months' note for \$3,000, signed by Robertson & Dustan; and the bank had also discounted for Champlin, and then held his promissory note for \$3,000 payable three months' from date and not then due, which

Van Blaroom *et al.* v. The Broadway Bank.

last mentioned note and the said stocks were then in possession of the bank. Champlin had also, a few days previously, deposited with the bank his draft for \$3,000, payable ten days after sight, drawn by him upon C. E. D. Wood, of Paducah, Kentucky, to be sent by the bank to Paducah for acceptance.

On the day above mentioned, Champlin called at the bank and then had a conversation with its president, who, upon his examination as a witness in this action, stated the details of the interview and conversation, as follows: "On the 27th of February, 1857, he" (Champlin) "called at the bank and wanted to know if we had heard from the draft. I told him no, we had not. He then said he must have the proceeds of the draft that day, or *he must go to protest for the first time*. I told him the bank could not do it, *unless the bank had collateral security*, as it was one name paper. Champlin then said: '*The bank holds all my stocks, and they are security for all my discounts and this draft.*' I said *if that was so*, the bank would put the proceeds of this draft to his credit; and we did so."

I am unable to resist the conclusion that this declaration of Champlin, followed as it was, by the discounting of his draft by the officer of the bank, to whom it was addressed, was a pledge, *in presenti*, of the stocks then held by the bank, for the purposes expressed in such declaration; that is, as security for all the discounts which had been made for Champlin as well as for that draft.

Let us look at the circumstances surrounding the transaction: Champlin, upon the brink of ruin, as he supposed, and with the greatest calamity pending over him that can fall upon the head of an honorable merchant, the public protest of his paper for non-payment, and the consequent destruction of his reputation and credit, was precisely in the condition best calculated, if not most certain, to induce him to make that or any other pledge of his stocks, necessary to avert the impending evil. Can it be doubted, then, that when he was informed by the president that his draft could not be discounted, for the reason that it was only

one name paper, or, in other words, that it was not sufficiently secured, he designed, by his answer, to pledge all his stocks, believing, as he told the president he did, that nothing but such discount would save him from protest? If there is any ambiguity in the words used, it is proper to consider this as a means of ascertaining the probable intention of the parties. But, considering that the bank was already in possession of the stocks as security for some indebtedness of Champlin's, I see no ambiguity in the language.

Very little is necessary to constitute a pledge. It is only essential that the property be, or be placed by the owner, in the hands of the creditor or trustee, with an intention, on the part of both parties, that it shall be retained as security for a certain debt or claim. In this case, the stocks were already held by the bank. Suppose they had not been, but that, when Champlin said, "the bank holds all my stocks, and they are security for all my discounts and this draft," he had, at the same time, handed the stocks to the president, would that have made the case any stronger? And can any one doubt, that, in the case supposed, the intention of Champlin to pledge the stocks, at that time, and in that manner would have been plain and manifest?

The declaration of Champlin was, at any rate, an admission that the stocks were then held by the bank as security for his discounts, an admission which his assignee is now estopped to deny. But it was not an admission that they were held as security, also, for the draft, for, at that time, the draft had not been discounted. And yet, Champlin told the president that all the stocks were held by the bank as security for all the discounts, and also for the draft; showing, conclusively, that he designed not merely to admit that they were already held as security, but to repledge them for the draft, as well as for the pre-existing debt; and to this the president assented, and thereupon, and clearly in consequence of such repledging, discounted the paper.

Williams v. O'Keefe *et al.*

Again, the declaration touching the discounts which had been made, and the draft, of which Champlin was still the owner, was in one sentence, covering both as much as either; how, then, can it be said that the stocks were pledged for the draft, at that time, and not for the discounts?

Regretting, as I do, to be compelled to differ from the conclusion to which the very able lawyer, before whom, as Referee, the cause was tried, has arrived, to the effect that the bank is not entitled to retain the stock as security for all discounts, which, at the time of this conversation, had been made to Champlin by the bank, my mind is forced to the conclusion that the judgment entered upon the report of the Referee should be reversed, and a new trial awarded.

ROBERTSON, J., wrote a dissenting opinion, he holding that upon a view of all the evidence bearing upon the transaction in question, the additional pledge was only as security for the draft, and not for previous discounts.

Judgment reversed and new trial ordered.

GEORGE WILLIAMS, Plaintiff and Respondent, v. JOHN O'KEEFE *et al.*, Defendants and Appellants.

1. In an action brought to recover damages from the defendants for negligently running over the plaintiff in the street, it appeared that the plaintiff, when crossing at a street corner, was knocked down by defendants' vehicle, which was driven at a rapid rate around the corner. *Held*, that an ordinance of the corporation, forbidding driving faster than a walk in going around the corner of any street, was admissible in evidence, not as furnishing proof of negligence on the part of defendants, but as tending to relieve the plaintiff from the imputation of negligence on his part.
2. In such actions, negligence, whether on the part of the plaintiff or the defendant, is a question of fact for the Jury to determine.
3. Unless the proof of negligence on the part of the plaintiff is so strong that the Court would set aside a verdict in his favor as being clearly against the weight of evidence, it is not proper to take that question from the Jury, by granting a nonsuit at the trial.

(Before BOSWORTH, CH. J., and MONCRIEF, ROBERTSON, BARBOUR and MONELL, J. J.)

Heard, May 31; decided, October 18, 1862.

APPEAL from a judgment entered on a verdict recovered on a trial before Mr. Justice MONCRIEF and a Jury, on the 17th of March, 1862.

The action was brought by George Williams against John O'Keefe and John J. Duryea, proprietors of a stage line in this city, to recover damages for alleged negligence in running against and injuring the plaintiff, with one of their stages.

On the 23d Nov., 1859, in the evening, plaintiff was passing up the Bowery. When crossing Second street, one of the defendants' stages, (whose route lay through the Bowery and Second street,) running up, and being driven at a rapid rate, turned into Second street. The pole struck the plaintiff, knocked him down, broke his arm and injured his neck. The plaintiff testified that the stage was going "furious, pretty hard—a hard trot—going fast." The plaintiff offered in evidence an ordinance of the corporation, declaring it to be unlawful to drive any vehicle in the streets of the city, faster than six miles an hour, or faster than upon a walk in going around the corner of any street. This was objected to by the defendants. The objection was overruled and the defendants excepted. The defendants moved to dismiss the complaint, on the ground, substantially, that the accident was occasioned by the plaintiff's negligence, or that his own negligence contributed to produce the injuries. The motion was denied, and the defendants excepted. Considerable testimony was given by the defendants, designed to contradict the plaintiff's evidence. The Jury rendered a verdict in favor of the plaintiff for \$1,500.

A motion for a new trial was denied at Special Term, and this appeal is as well from the order denying the motion as from the judgment.

Geo. R. Thompson, for defendants, appellants.

S. C. H. Bailey, for plaintiff, respondent.

BY THE COURT—MONELL, J. There was no valid objection to proving the corporation ordinance, regulating the
Bosw.—Vol. IX. 68

Williams v. O'Keefe et al.

rate of speed of vehicles in the city. The objection to it was, that no infraction of it having been shown, it was immaterial. It does not appear for what purpose it was offered, and although it furnished no evidence of negligence in fact on the part of the defendants, (*Brown v. Buffalo & State Line R. R. Co.*, 22 N. Y. R., 191,) yet it seems to me it was proper and competent evidence for another purpose; namely, as tending to prove, in connection with other testimony, that there was no negligence on the part of the plaintiff. The ordinance was one of the public laws of the city, and as such was presumed to have been known to all citizens. This knowledge was calculated to regulate in a greater or less degree, the care which any one traveling upon the streets would exercise. The presumption is, that the ordinance would be observed,—that in turning around a corner from one street into another, necessarily passing over the cross-walk, the pace of the horses would be slackened to a walk. Surely then, a foot passenger knowing that such an ordinance existed, and believing that it would be observed, would not be called upon to exercise that care and prudence which he would exercise if there was no restriction upon the rate of travel. So that if he had reason to believe the vehicle would hold up to a walk as it approached the sidewalk, he would and might properly and with safety act very differently than if he believed the vehicle would continue on across the cross-walk at a rapid rate. The evidence, in my judgment, was therefore proper as tending to relieve the plaintiff from the imputation of negligence on his part, and could well be considered by the Jury in connection with other evidence for that purpose.

As I understand the law, as now settled by the Court of last resort in this State, negligence is a question of fact for the Jury to determine, whether it be negligence on the part of either party. The plaintiff must be free from fault, but he need not show it affirmatively in the first instance. He must be able to satisfy the Jury, from all the facts and circumstances in the case, that he has not, by his own neglect, contributed in any degree to the

injury. (*Johnson v. The Hudson R. R. Co.*, 20 N. Y. R., 65.) DENIO, J., in this case, says, (p. 69,) after stating the general rule, "the plaintiff's case, when presented to the Jury, must not be defective on that point any more than upon that of the defendants' negligence." He further says "it is not a rule of law of universal application that the plaintiff must prove affirmatively that his own conduct on the occasion of the injury was cautious and prudent. The *onus probandi* in this, as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts." And, again, "the culpability of the defendant must be affirmatively proved before the case can go to the Jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances."

Accordingly, it seems to be now well settled that unless the proof of negligence on the part of the plaintiff is so strong that the Court would set aside a verdict in his favor as being clearly against the weight of evidence, it is not proper to take that question from the Jury. Independently of this view, I cannot discover any evidence in the case, up to the time the plaintiff rested, which can properly impute any negligence to him.

The motion to dismiss the complaint was properly overruled.

The relation given by the defendants' witnesses of the accident as seen by them, if I could believe that it referred to the same accident testified to by the plaintiff, would certainly excite the suspicion that the Jury had not dealt fairly between the parties. But without entering upon an analysis of the testimony, it is sufficient that I believe the defendants' witnesses saw another and different accident, occurring possibly on the same evening, at about the same place and near the same hour. The plaintiff's relation of the accident, and of its consequences, is corroborated by several witnesses, especially in that he did not leave his house for nine or ten days after he received the injury. The plaintiff's and defendants' witnesses stood confronting each other, and the Jury who tried the case

Chamberlain v. Dempsey.

were best able to determine whose was the correct version of the affair. It is enough for us that we cannot say their verdict is clearly against the weight of the evidence.

The case seems to have been fairly put to the Jury. The Judge charged as requested by the defendants' counsel, that there could be no recovery by the plaintiff if the Jury believed that the accident was caused by his negligence, or that his negligence in any degree contributed to the accident. The Jury have found against the defendants upon all the questions, and we see no reason for disturbing their verdict.

The judgment must be affirmed.

MOSES CHAMBERLAIN, Plaintiff and Respondent, v. JANE R. DEMPSEY, (who was impleaded with William D. Salisbury *et al.*), Defendant and Appellant.

Where, upon the trial of an action for the foreclosure of a mortgage upon real property, the Judge directed judgment for the plaintiff, without, however, awarding costs, and ordered a reference, to ascertain the amount due the plaintiff and whether there were any prior liens, &c.; and upon the coming in of the report the plaintiff applied to another Judge, without notice to the other parties, and obtained final judgment awarding costs:

Held, that the judgment was unauthorized, and should be reversed on appeal. Whether the first decision was intended to be final or not, it did not warrant such a judgment. The Judge before whom the cause was tried, alone is competent to pass on the question of costs.

Before ROBERTSON, WHITE and BARBOUR, J. J.)

Heard, June 11, 1862; decided, October 17, 1862.

THIS action was brought to foreclose a mortgage. The facts are fully stated in the report of a previous decision in the cause, (*ante*, 212,) on which a new trial was ordered. Upon the second trial, the plaintiff admitted the answers of Delaplaine and Platt, and presented the issues raised by the defendant Dempsey as the only issues in the cause. After the trial, the plaintiff entered judgment, as stated in the following opinion; and the defendant Dempsey again appealed to the General Term.

George R. Thompson, for defendant, (appellant,) besides presenting points on the merits, urged that the judgment was erroneous, because it was entered solely on the Referee's report computing the amount due, and did not refer to the trial, and was rendered by a Judge who did not try the action, and was not based upon the judgment rendered at the trial; and that the plaintiff had fallen into the same error pointed out by the General Term on the former appeal in this action. (See 14 Abbotts' Pr., 241; *S. C.*, ante, 212; *Lawrence v. Farmers' Loan & Trust Co.*, 15 How. Pr., 57.)

Wm. M. Allen, for the plaintiff, (respondent.)

BY THE COURT—BARBOUR, J. This action, for the foreclosure of a mortgage upon real estate, was tried before Justice MONCRIEF, without a Jury, and decision reserved. Subsequently, and on the 12th of April, 1862, the Justice filed his findings of fact and conclusions of law, the latter of which were as follows:

First. That the plaintiff is entitled to a judgment of foreclosure and sale, for the purpose of discharging the amount of principal and interest due upon the mortgage, together with the costs of suit.

Second. That the plaintiff is not entitled to a judgment for any deficiency.

Third. That it be referred to Hon. Murray Hoffman, as sole Referee, to ascertain and report the amount of principal and interest due to the plaintiff upon such mortgage; and also to ascertain and report the amount due upon the mortgage described in the answer of the defendant, George W. Platt; and also to ascertain and report whether there are any prior liens, by mortgage, upon said premises, and whether said prior mortgages are due.

On the same day, an order was made by Justice MONCRIEF, referring the cause to Murray Hoffman, to ascertain and report upon the matters mentioned in the third conclusion of law, as therein indicated.

Chamberlain v. Dempsey.

On the 22d of April, the Referee made his report upon the matters referred to him, and also, by consent of parties, reported other facts and details not called for by the order of reference; which report was filed on the 24th of April, and notice thereof given by the plaintiff's attorney to the other attorneys in the action; and, no exception to the report having been filed, the plaintiff's attorney, eight days thereafter, applied to another Justice, without notice to defendants, for a judgment, and the same was entered upon his direction. The judgment does not allude to the trial, nor to the findings and conclusions of Justice MONCRIEF, but states, by the way of inducements, that an order of reference to Murray Hoffman had been made, and his report filed, setting forth, in brief, its contents, that eight days had expired since such filing, and no exceptions had been filed. The judgment is in the ordinary form, and contains various directions not specifically covered by the conclusions of law of Justice MONCRIEF; among which is one providing for the payment to the plaintiff and to two of the defendants, of some four hundred dollars, out of the proceeds of the mortgaged premises, for their costs and disbursements in the suit.

It thus appears that the cause was tried, at least in part, before one Judge, who found some facts, and arrived at certain conclusions of law, and then sent the case to a Referee to ascertain and report other specific facts; that, upon the coming in of such report, and, so far as appears from the record before us, on that report alone, and without an examination of the pleadings, proceedings, testimony, or even of the findings and conclusions of the Justice before whom the trial had been partially had, another Justice directed the entry of a judgment, providing, among other things not determined by the conclusions of the former, that a large sum should be paid out of the avails of the sale, and therefore, by the appellant, by way of costs.

If we were to hold that the case was, virtually, decided by the findings and conclusions of Justice MONCRIEF,

The East River Bank v. Kennedy.

then, it is easy to see, the direction in the judgment for the payment of costs is erroneous, inasmuch as Justice MONCRIEF did not, in his discretion, (Code, § 306,) decide that the plaintiff or either of the defendants was entitled to recover such costs, and therefore, it may safely be inferred, refused to award them. Or, if we assume that his decision was not intended to be a final determination of the whole matter, then we have before us the anomaly of a trial and decision of a portion, only, of the issues in a cause by one Judge, and its final determination by another; and that, too, upon hearing but one of the parties, without notice to the others, and, so far as the case presented, shows, without any knowledge as to any prior proceedings in the cause, aside from what are contained in the report of the Referee. Indeed, in either case, the judgment is not warranted by the findings and conclusions of the Justice before whom the cause was tried, who, alone, is fully competent to award costs or withhold them, in his discretion.

For these reasons, and those given by the Chief Justice and Justice ROBERTSON in their opinions upon a former appeal in this action, I think the judgment should be set aside, with costs, leaving the parties to move for a new trial, or otherwise, as they may be advised.

ROBERTSON and WHITE, J. J., concurred in this opinion.

**THE EAST RIVER BANK, Plaintiffs and Appellants, v.
THOMAS KENNEDY, Defendant and Respondent.**

1. The indorser of a promissory note which was past due, induced the holders of it to sue the maker; and, pending the action, and with the assent of the indorser, the plaintiffs' attorneys received from the maker a part payment and his note for the residue, upon a written stipulation that proceedings should be stayed, but if the new note should be unpaid at maturity judgment should be entered in the action against him; and they thereupon surrendered the original note, but nothing was said about releasing the indorser.

The East River Bank v. Kennedy.

Held, in an action brought by the same plaintiffs against such indorser, that the surrender of the original note being explained by the plaintiffs' attorney as having been inadvertently made, these facts did not constitute any agreement to discharge the indorser.

2. Upon such evidence it was error to leave it to the Jury as a question of fact whether an agreement to discharge the indorser was made.
3. An authority given to attorneys to sue the maker of a note does not empower them to release an indorser without satisfaction or the consent of their clients.

(Before MONCRIEF, ROBERTSON and MONELL, J. J.)

Heard, October 6; decided, November 29, 1862.

THIS action was brought to recover the amount due on a promissory note of one Billings, indorsed by the defendant. The complaint stated, in the usual mode, facts upon which the plaintiffs might recover, if the note were still in their possession. But in addition thereto it alleged that the plaintiffs' attorneys delivered it up to the defendant by inadvertence; that no consideration was paid by him for its surrender; that it never was agreed by the plaintiffs that he should be released from his indorsement; that the attorneys received such note merely to prosecute the maker and had no power to release the indorser. It demanded both a delivery of the note and judgment for the amount due on it. It would be substantially an action for the conversion of a note, were there any allegations to that effect, or even of a demand and refusal.

The complaint also alleged that the plaintiffs had previously brought an action against the maker of the note, and that he, in consideration of a stay of proceedings for sixty days in such action, paid a part of the amount due thereon in cash, and gave a new note for the balance, and agreed that a judgment might be entered therein against him at the end of such time, in case he did not pay the new note given by him for the residue, (which was payable in the same time,) and costs.

The answer of the defendant in the present action controverted all the allegations of the complaint except the making, indorsement, and demand of payment of the note, and notice to the defendant of its non-payment. It then

alleged a surrender of the note by the plaintiffs to the maker, and his destruction of it in the defendant's presence; the acceptance by the plaintiffs of the note of the maker and the money paid by him, as alleged in the complaint; their ratification of their attorneys' acts and retention of both note and money; their failure to retain the defendant's liability on the old note, and his disability to recover the amount of the note from the maker in consequence of its destruction.

The cause was tried on the 25th of October, before Mr. Justice WHITE and a Jury.

The only evidence in relation to any authority of the plaintiffs' attorneys to discharge the defendant from any liability on the original note, beyond that to be implied from their authority to prosecute it against the maker, was the testimony of one of such attorneys, who stated, "he had no business to release him." The defendant admitted, in his examination on the trial, that nothing was ever said by any of the parties, or introduced into any oral or written agreement, respecting his liability. The note was proved to have been delivered up to the maker in the defendant's presence by one of the attorneys for the plaintiffs. Such attorney testified he did it "*by inadvertence.*" The plaintiffs' cashier (Carman) testified that they sued the maker to accommodate the defendant, who wanted them to do so for his benefit. He saw the attorneys frequently in relation to such suit, and paid them the costs of it after being sued for them.

The only written agreement between any of the parties was a stipulation made in the suit against the maker of the note. By that, "in consideration of the stay of proceedings therein," he stipulated, that if his new note then given, should not be paid when due, such stay should be vacated and the plaintiff take judgment for the amount due on the original note. No other written agreement was proved, but one of the attorneys for the plaintiffs, in that suit, (Banks,) testified that he agreed with the maker of such note that if he would pay a certain sum on

The East River Bank v. Kennedy.

account thereof, and give his note for the residue, with interest and costs, payable in sixty days, he would give him sixty days to pay that balance, and thereupon he took from such maker such stipulation; that the defendant authorized him to take such note and cash, and make such settlement, and was in his office when it was made. The defendant admitted on his examination that he knew of the settlement and that nothing was said by either himself or the plaintiff's attorney, respecting his discharge; but he denied any knowledge of the stipulation.

A motion to dismiss the complaint, made after proof of the stipulation and inadvertent delivery of the note, was denied. The Court permitted the Jury to consider the permission to take judgment on the note, by the stipulation, as a circumstance to show that such note was given up inadvertently, and instructed them that, if that were so, the defendant was still liable. The defendant had testified that he "*supposed*, of course, when the maker paid "that money, and gave a new note," he (the defendant) "was released from all liability," and that he "knew "nothing to the contrary;" the version of that testimony, given by the Court to the Jury, was that the defendant "*understood* the arrangement * * to be a full and final "settlement of the old note and discharge of his liability."

The Court, however, left it to the Jury to determine "whether the defendant assented to the arrangement with "the maker of the note, with the understanding that he "was discharged;" and instructed them that the defendant was discharged, "if it was intended to be a full settlement of the original note, which would discharge" him, and "if the parties intended he should be;" and finally declared "the whole question to be, what the parties agreed "to do." The plaintiffs' counsel excepted to all such directions.

The Jury found a verdict for the defendant; a motion was made for a new trial, at Special Term, on a case, and denied; from the judgment on such verdict, and from the order denying a new trial, the plaintiffs appealed.

The East River Bank v. Kennedy.

Elbert E. Anderson, for plaintiff, (appellant.)

I. It appears, from the testimony, that the first action was virtually brought by Kennedy against Billings. It would be against good faith to allow a stipulation made in such a suit to defeat plaintiffs' rights on the original note.

II. There was no sufficient consideration to support an agreement to discharge Kennedy. (*Keeler v. Bartine*, 12 Wend., 110; *Crawford v. Millsbaugh*, 13 Johns., 87.)

III. There is no evidence to support the conclusion that there was an agreement that Kennedy should be discharged from liability on the original note.

IV. The delivery of a security from obligee to obligor, and its destruction, is only *prima facie* evidence of an intention to cancel. This presumption may be rebutted, and in this case is rebutted by the positive sworn testimony of Banks, and by the admission of the defendant that nothing was said as to whether he was to be discharged or not. (*Olcott v. Rathbone*, 5 Wend., 490.)

V. The taking of a note from one of several debtors, or from a third person for a pre-existing debt, is no payment, unless it is expressly agreed to as such. (*Muldon v. Whitlock*, 1 Cow., 306; *Edwards on Bills*, 192, 193; *Kean v. Dufresne*, 3 Serg. & Rawle, 233; *Ex parte Blackburn*, 10 Vesey, 206.)

J. S. Slauson, for defendant, (respondent.)

I. The controlling question in this case is, whether the parties intended and agreed to accept the money and new note of Billings in payment of the old note.

II. It is a matter of evidence to show the nature of the transaction; and it is then a question for the Jury to determine, from the facts and transactions proven, what the intention was; and the agreement need not be in express words, but may be inferred from the whole transaction, and the finding of the Jury is conclusive. (*Tobey v. Barber*, 5 Johns., 67; *Arnold v. Camp*, 12 Id., 409.)

The East River Bank v. Kennedy.

III. The charge of the Justice presented fairly before the Jury the issues for their determination.

IV. There is sufficient evidence to sustain the finding of the Jury.

V. Kennedy was an indorser, and not a joint maker nor partner; and the facts are abundantly sufficient to discharge an indorser under the strict rules by which holders and indorsers and principals and sureties are bound. (*Kingsley v. Vernon*, 4 Sandf., 361; *Hart v. Hudson*, 6 Duer, 294.)

The consent to allow judgment and the payment of the costs in an action then undetermined, furnished a sufficient consideration for the discharge.

The effect of taking the new note was to extend the time of payment and discharge the indorser, and the delivery up and destruction of the old note certainly precluded the indorser from taking it up from the holder and resorting to the indorser. (*Hart v. Hudson*, 6 Duer, 294.)

BY THE COURT—ROBERTSON, J. Two questions are involved in this case: *first*, whether any valid agreement was ever made to discharge the defendant; and, *second*, whether the time given to the maker of the note discharged him as indorser. The first, besides the question of fact whether any agreement was made, involves that of a sufficient consideration. The second, besides the question of fact whether the defendant assented to what was done, embraces that of his being prejudiced, even if he did not assent.

Unless the stipulation of the maker of the note in the suit against him, and the cotemporaneous agreement to stay proceedings in connection with the manual tradition of the note to such maker constitute, operate to create, or prove, an agreement to accept the cash then paid, the note then delivered and the judgment to be entered in case it was not paid, in place of the liability of all parties on the original note, or discharge the defendant, there was no evidence of one in this case. There is not a particle of

evidence of any additional stipulation to that effect; the defendant stated that not a word was said about his liability. He evidently relied, as he testified, upon what he considered to be a release without any express agreement, the delivery of the cash and a new note, and therefore never made any express agreement.

No parol evidence could add to or vary the terms of the written stipulation of the maker of the note, or prove a different consideration from that stated in it. It merely permits the plaintiffs to enter judgment, in case the new note is not paid in sixty days, and the sole consideration expressed, for that is the stay of proceedings. Not a word is said in it of the release of any of the parties to the note. On the contrary, to warrant the entry of the judgment, the liability of the maker at least must have been retained, otherwise it would be a judgment by confession, which requires a certain statement to be made, (Code, §§ 382, 383.) The learned Judge informed the Jury that it was merely a circumstance to prove such retention of the maker's liability, when he should have declared it to be conclusive of it. The surrender of the note, or discharge of any of the parties to it, did not enter into the written agreement of the maker of the note, or the verbal agreement of the attorney for the plaintiffs.

It may well be doubted whether the mere delivery of the original note, indorsed as it was, to the maker by the plaintiffs, would, if unexplained, either be, or operate to create or prove an agreement to discharge any one. But, as the learned Judge charged the Jury, when inadvertently delivered, it certainly neither created nor proved any agreement to discharge. Upon the question of fact, the evidence of the plaintiffs' attorney is uncontradicted, and he is fortified by the reservation of the right to enter up judgment; such being the case, the fact of delivery furnishes no warrant for any inference prejudicial to the plaintiffs. (*Olcott v. Rathbone*, 5 Wend., 490.) It was error, therefore, to leave the question of an agreement to discharge the defendant to the Jury as one of fact, when the only circumstance

The East River Bank v. Kennedy.

to sustain it was fully explained by uncontradicted evidence.

But even beyond this there was no evidence of any authority by the plaintiffs to their attorney to discharge the defendant. Laying aside the consideration of the facts, (of which there appears to be strong evidence,) that the attorneys were in reality those of the defendant, the suit being brought by his directions, although in the plaintiffs' name; that he frequently called about it, paid the costs and acquiesced in the arrangement with the maker of the note; the mere authority of the attorneys to bring the suit, would not sanction their discharging any of the parties without being paid the full amount. It is doubtful whether it even authorized the stay of proceedings. (*Gaillard v. Smart*, 6 Cow., 385; *Shaw v. Kidder*, 2 How. Pr., 244; *Bowne v. Hyde*, 6 Barb., 392.) If the authority had been to collect the note, it might have been different. (*Livingston v. Radcliff*, 6 Barb., 201.) The attorney testifies that his orders were to sue the maker of the note. Even, therefore, to discharge the maker, the authority was insufficient, unless the defendant was the real plaintiff in such suit, and his presence and assent authorized the delay. He does not undertake to deny his presence at, knowledge of, and assent to the settlement. But to proceed against the defendant or to treat with him, the attorneys had no authority, and if, by delivering up the note they intended to discharge him, the act was *extra vires*.

The second question might possibly arise in the case, although not insisted upon or presented to the Jury, and hardly raised by the pleadings. The charge of the learned Judge was, that "if there was any neglect on the plaintiff's part, to prosecute the note, against 'the maker,' to which the defendant did not assent," and the maker "became insolvent, and by reason of such negligence the defendant could not collect the note from him," the former was discharged. This was, however, not excepted to; but literally construed, it is far from being borne out by any case or principle. There is no obligation on the holder of

a note, to prosecute a principal debtor diligently to prevent the loss of the liability of a surety, even on the request of the latter. His remedy is to discharge the obligation and proceed against the principal himself. But by the neglect in this case, he may have meant the giving time; otherwise there was no evidence of any. That was, however, done with the defendant's assent, as appears by uncontradicted evidence, since he knew of the settlement and approved of it, and must have known of the stay of proceedings. The remark was calculated to mislead the Jury.

There appears to be some confusion in the testimony, as to the number of stipulations in the first action. The attorney of the plaintiffs testifies he gave a stay of proceedings therein, 'till the new note became due; the defendant "*had perfect knowledge of that stipulation.*" The latter testifies he had no knowledge of any stipulation. The only one in evidence does not contain a stay of proceedings, although it recites one, and was not given by the attorney for the plaintiffs.

But as the Court was bound, in the entire absence of any testimony of a distinct agreement to discharge the defendant, and with the full explanation of the only doubtful circumstance, to charge the Jury that the defendant was not discharged without such agreement, of which there was no evidence, the case should go back for a new trial.

I am of the opinion, therefore, that the judgment should be reversed, and a new trial granted, with costs to abide the event.

MONELL, J. I concur on both grounds: *First*, there was no evidence of an agreement to discharge the indorser; all the witnesses testify that nothing was said on the subject, and Kennedy merely supposed he was to be discharged. It was error, therefore, to submit it to the Jury as a question of fact, for them to determine whether there was any agreement; such an agreement cannot be implied.

The Chatham Bank v. Betts.

Besides there was no consideration moving from Kennedy for such an agreement, if it had been proved. *Second*, the attorney had no power to discharge the indorser without satisfaction, or the consent of the plaintiff. (10 Johns., 220; 21 Wend., 362.)

Ordered accordingly.

THE CHATHAM BANK, Plaintiffs and Respondents, v.
FREDERICK B. BETTS, (who was impleaded with Archibald Thomas *et al.*), Defendant and Appellant.

1. Where P. being asked by T. to discount an accommodation note, replied he had no money, and being asked to procure it to be discounted, took it, indorsed it, and procured the plaintiffs to discount it for him, at lawful interest, and the plaintiffs credited him with the amount; but on his paying over the proceeds to T. he deducted a large percentage; *Held*, that these facts fully warranted the Jury in finding that there was no usury in the transaction between P. and T.
2. Where usury is the defense, the plaintiff has a right to have the question whether there was a corrupt agreement, submitted to the Jury; especially where it is to be made out from circumstances, and must be determined, in a great degree, from the intent of the parties.

(Before MONRIEF, ROBERTSON and MONELL, J. J.)

Heard, October 6; decided, November 29, 1862.

APPEAL from a judgment entered on a verdict for the plaintiffs, and also from an order denying a new trial.

The action was brought by the Chatham Bank against Frederick B. Betts, Archibald A. Thomas and Samuel B. Potter. Betts alone defended the action. The facts are fully stated in the opinion of ROBERTSON, J. The plaintiff having recovered a verdict, the defendant moved, at Special Term, in May, 1862, for a new trial. The motion was denied, the following opinion being rendered:

ROBERTSON, J. This is a motion for a new trial, upon a case made upon the ground that the verdict was against evidence. The action is on a promissory note drawn by the defendant Betts, in favor of the defendant Thomas,

indorsed by him and the defendant Potter. It was for \$2,350, payable three months after date at the Mechanics' Bank, and dated on the 18th of September last. Two defenses are set up in the answer: one, that the suit is prosecuted for the benefit of the defendant Potter, who is the real party in interest, and the other is, that the note in suit was given solely for the benefit of Thomas, without any consideration, and that it was discounted by Potter upon an usurious agreement with the defendant Thomas, by which the former reserved the sum of \$150 as extra interest.

On the trial, the defendant Thomas testified that the note in suit was given to realize the amount for Betts' benefit. The defendant Potter testified that Thomas called upon him repeatedly with the note, asking him to discount it, to which the witness replied, he had no money; when the former said, "You can get it discounted;" and repeatedly stated he must have the money; he did not state for whose accommodation it was; the witness refused to do it. Thomas said, "You can get it done at the bank." The former finally promised to see if he could get it done at the Chatham Bank; he did call at the bank, whose President said they were short. Thomas again called, and the witness again told him he did not think he could get it discounted, but was finally prevailed on to take the paper, and he offered it for discount. He asked the cashier if he would discount a piece of paper for him, who referred him to the President, who showed some disinclination to take it. Potter again told Thomas he did not think he could get the paper discounted. Prior to Potter going to the plaintiffs, on the 5th of October, he said to Thomas, "If I can get this discounted, how much do you want to draw; my account is about drawn out in the bank?" and the latter said, "I must have \$2,000." On the 4th of October, the President said it would be passed to Potter's credit; on the morning of the 5th it was discounted, and Potter gave Thomas a check for \$2,000, and on the 21st, a check for \$208; the eight dollars had nothing to do with

The Chatham Bank v. Betts.

a prior transaction. In regard to the commission Potter was to charge, there was, as he testifies, "not the first syllable said about two and a half or three per cent, or any discount named." When the second check was given, Potter testifies not a word was said about the balance. Thomas asked for a check for the balance, and the witness gave him one for \$208, and no words passed. On cross-examination this witness testified, that he had previous notes of Betts, indorsed by Thomas, which he had discounted at the rate of two and a half per cent per month, and gave Thomas the money.

Upon this testimony, it is perfectly clear that Potter acted as the agent of Thomas and Betts in getting the note discounted; and that if he failed in delivering the whole proceeds received by him, whether the amount retained by him was understood to be a commission or not, for his trouble and responsibility in indorsing the note, it did not make the note usurious in the hands of the plaintiffs, who discounted it for Potter, at the legal rate, as appears by the testimony of their President, (Hayden.) He testified that the bank discounted this note for Potter, and on his credit, placing, on the 4th of October, the sum of \$2,315¹/₂% to his credit. Potter borrowed the money of the bank; prior to that time he had only a small balance of \$200 or \$300 to his credit; when the note was discounted and the money placed to Potter's credit, it was his money; after the note was protested, money of Potter's was left in the bank undrawn for; it was the plaintiff's custom, in such case, not to allow it to be drawn for; the note was not charged back to him or check presented for it; there was an implied understanding, although no positive arrangement, that the money should remain until the note was paid; the note was discounted at seven per cent.

To this is opposed the testimony of Thomas, who states that he got the note in suit without paying anything for it, from the defendant Betts, to realize the amount for the benefit of the latter, and a day or two after took it to

The Chatham Bank v. Betts.

Potter and asked him to discount it for him, to take it and see what he could do for him; nothing was then said about the rate; he said he could not do it at less than two and a half per cent per month, and the witness left the note. This witness states he did not say anything; he left the note with Potter to get the money; he got \$2,000 on the 5th of October, and the balance of \$200 on the 20th, eight dollars for another transaction being included in the check; Potter deducted \$150 for the three months, and took the note at \$2,200; Thomas deposited the money he got from Potter in the bank where he kept an account, and passed it to Mr. Betts within a day or two; the transaction was on Betts' account. On being cross-examined, he stated that he asked Potter to take the note and try what he could do with it. After receiving the \$2,000, he asked for the balance of that note, and received the check for \$200; "Potter said he would not do it less than the rate of about two and a half per cent per month; *that it would not pay him to go to the bank to get the money and get it discounted.*" He admitted that Potter gave as a reason for not discounting the note, that he had no money and could not do it, and that he told him he got the money he gave him out of the Chatham or Grocers' Bank; the witness used the money he got for a little while, and paid it in different amounts to Betts; he admitted that Potter told him the bank was not ready to discount it.

This testimony does not vary the transaction. Thomas knew Potter did not have money to buy the note; that he went to get it discounted; nay, he asked him to take it and see what he could do with it; he waited after he was informed the bank had been applied to, and delayed discounting it until it would agree to do so; did not object when Potter told him that less than two and one-half per cent would not pay him to go to the bank and procure the discount; received the checks of Potter drawn on the bank by whom it was discounted, and obtained thereby the proceeds of such discount; Potter did not pay any money except the proceeds of the discount, which was

The Chatham Bank v. Betts.

made by crediting him with the amount for which he drew the check in favor of Thomas. There is no room for the pretense, that Potter first discounted the note at an usurious rate, and then procured it to be discounted by the bank; nor that the 150 dollars was withheld, except to compensate him for the trouble of going there and getting it discounted, which involved the necessity of his indorsing the note.

There is not even a conflict of testimony in this case, except as to the mention of the rate of commission, which is denied by Potter, although mentioned by Thomas, and that does not affect the transaction. Even the worst possible inferences from Thomas' testimony, would hardly show an intent to make the transaction usurious; the testimony of the other witnesses show it could not have been.

I do not find any error in the charge, or the verdict of the Jury. The motion for a new trial must, therefore, be denied with costs.

The plaintiffs entered judgment on the verdict, and the defendant, Betts, now appealed both from the judgment and from the order refusing a new trial.

Ira D. Warren, for defendant, (appellant.)

Argued, that the verdict was not only against the weight of evidence, but against the undisputed facts of the case which render the note usurious and void, and a new trial should be granted; citing *Catlin v. Gunter*, (1 Kern., 368,) *Clark v. Loomis*, (5 Duer, 468,) *Ib.*, (22 N. Y. R., 312,) *Williams v. Storm*, (2 Duer, 52,) *Powell v. Waters*, (8 Cow., 669,) *Bank of Salina v. Henry*, (2 Denio, 157,) *Morse v. Cloyes*, (11 Barb., 109,) *The East River Bank v. Hoyt*, (22 How. Pr., 478, and cases,) *North v. Sergeant*, (33 Barb., 350,) *Cummings v. Morris*, (3 Bosw., 560.)

D. M. Porter, for plaintiffs, (respondents.)

Cited *Flint v. Schomberg*, (1 Hilt., 532,) *Ryckman v. Cole*

man, (21 How. Pr., 404, affirmed on appeal at General Term.) *Van Duzer v. Howe*, (21 N. Y. R., 531,) *Condit v. Baldwin*, (Id., 219,) *Gould v. Rumsey*, (21 How. Pr., 97.)

BY THE COURT—MONELL, J. I entirely agree with the learned Justice ROBERTSON, who heard and decided the motion at Special Term, that there is not even a conflict of evidence in this case, upon the question of usury, the only defense urged upon the argument of the appeal. The testimony fully warranted the Jury in finding that there was no usury in the transaction between Potter and the defendant. It is clear, I think, that Potter retained the sum charged as having been taken for usury, as a compensation for procuring the note to be discounted at the plaintiffs' bank for Thomas. Such compensation being retained both as a commission for procuring the money, and as payment for lending the agent's credit is not usury. (*Van Duzer v. Howe*, 21 N. Y. R., 531.)

The verdict cannot be disturbed on the facts of the case. The only exception is to the refusal of the Judge to charge "that the facts in the case, as they are disclosed in the evidence, render the note usurious and void; and the defendant is entitled to a verdict." To have so charged would have been error.

Whether the note was tainted with usury, was a question of fact for the Jury, and it would not be proper for the Court to take that question from the Jury, and pronounce upon it as a matter of law. The taking of usury must be in pursuance of a corrupt agreement, express or implied; and it is difficult to conceive of a case, tried before a Jury, where the Judge would be justified in depriving a party of the right of having it passed upon by them, whether there was such corrupt agreement, especially, when it is to be made out from circumstances, and must be determined in a great degree, by the intent of the parties.

The question of fact was fairly submitted to the Jury, and they were instructed, that if they found such usurious agreement was made between Thomas and Potter, as was

claimed by the defendant, they must find a verdict for the defendant.

For these reasons, and for those more forcibly and clearly expressed by the learned Justice who gave the opinion at Special Term, I am of opinion the judgment and order appealed from should be affirmed.

Judgment accordingly.

JAMES MOORE, Plaintiff and Appellant, v. JOHN J. V. WESTERVELT, Sheriff, &c., Defendant and Respondent.

1. Upon a question of negligence in mooring a vessel, it is proper to ask a witness, who has been shown to be competent to give an opinion, what was the condition of the fastenings of the vessel, as to safety; this is a subject of science and experience, not of common knowledge.
2. A Sheriff, in respect to property in his custody, is bound to exercise that degree of care, and no greater, which a careful, prudent man of good sense and judgment would exercise respecting such property, if it were his own.
3. The provision of section 215 of the Code of Procedure, which requires the Sheriff taking personal property in proceedings of claim and delivery, to keep it in a secure place, does not require him to remove it from its place of deposit, unless it is unsafe there; and if that place be a vessel at a wharf, he is bound to see that it is properly moored, secured and fastened, against all ordinary perils of winds and waves, and if necessary, protected against any storm or gale, after it arose, by every means within his reach, which a prudent man would use for the purpose, either by removing the vessel to another place, or otherwise; but he is not bound to anticipate a storm of so unusual violence as not to have been reasonably expected.
4. Thus where, in an action to recover the possession of a cargo of coal, from the master of a vessel lying at a pier in the port of New York, the Sheriff took possession, and put a keeper in charge of the coal, with the consent of the master, and the vessel sunk at the wharf during a violent storm; *Held*, in an action to recover from the Sheriff the damages sustained by the coal, and the expense of raising it, that it was only the duty of the Sheriff to take such steps to insure its safety, as a careful, prudent man of good sense and judgment, well acquainted with the condition of the vessel, and her location with regard to exposure to storms, and having all the power of the Sheriff in the matter, might reasonably have been expected to take, had the coal belonged to himself.
5. In such action, where the Court properly instructed the Jury as to the Sheriff's duty; *Held*, that a request to charge that the Sheriff is responsible for the negligence of the master and crew, after he took possession, was not proper in form, and it was not error to refuse it.

Moore v. Westervelt.

6. *Held further*, that the verdict for the defendant was not against the weight of evidence in this case, and that judgment thereon should be affirmed.

(Before MONRIEF, ROBERTSON and MONELL, J. J.)

Heard, October 6; decided, November 29, 1862.

THIS was an appeal by the plaintiff from a judgment entered on a verdict recovered by the defendant, as well as from an order made by the Court at Special Term, denying the plaintiff's motion for a new trial.

Before the trial now under review, this case had been tried several times before a Jury. On the first trial, the Jury found for the defendant, and on appeal, the judgment was reversed and a second trial ordered. That decision is reported in 2 Duer, 59. The reader is referred to that report of the case for a statement of the pleadings. The second trial was had in March, 1856, when the Justice directed the Jury to find a verdict for the plaintiff, subject to the opinion of the Court at General Term, upon which the Court gave judgment for the plaintiff. That decision is reported in 1 Bosw., 357. Upon appeal to the Court of Appeals, the judgment was reversed and a new trial ordered. That decision is reported in 21 N. Y. R., 103.

The cause was tried again on the 18th of February, 1862, before Mr. Justice BARBOUR and a Jury.

Evidence was given to show a proposal by the defendant to the plaintiff to take the cargo when seized by the present defendant, and a refusal by the latter officer to allow him to do so, and some evidence in contradiction thereto.

Considerable testimony was taken as to the condition of the vessel in reference to loading or leaking, her fastenings, the character of the storm, the previous probability of its taking place, and its direction, also the possibility of removing the vessel while it continued, and saving the cargo.

Several witnesses, including the mate and a hand on board of the vessel, testified to her deep lading; the captain placing her deck within three inches and another witness four, from the surface of the water. The former

Moore v. Westervelt.

testified that three or four tons were put on her deck after she was loaded; another witness, (Simpson,) testified that she was "much out of repair." In regard to the leakage, a hand on board, (Quin,) testified that she leaked a hundred strokes an hour when on her passage under sail: the master (Hoffman) reduced this to twenty-five to thirty strokes per hour when she started. The mate testified to fifty strokes in twenty-four hours, when she was at the wharf: "six inches clear board" were pumped out. The master stated that she was "required to be pumped twice a day, and he kept her pumped out all the time:" the mate, that he saw she was pumped out every day. Quin testified that the night before she sunk, "he was pumping her all night;" that she began to leak more than usual about five o'clock in the afternoon before, and that it rained and blew the day before harder than the previous night. The wind began to increase on the afternoon of the second day before the sinking of the vessel, went on increasing next day and during the night, and she sunk at half past four o'clock in the morning.

As to the fastenings the master of the vessel testified that she had "enough to hold her:" the plaintiff admitted "that when she was raised, after being sunk, one line remained fastened." Charles H. Hallenbeck, the keeper put on board by the Sheriff, stated that the hawsers by which the vessel was fastened were of the kind usually used for the purpose, a large rope; that he should judge she was safely moored, and the fastenings were proper fastenings for a vessel in that condition; he had seen vessels often before moored in that way, but sometimes with a storm they had broken those fastenings. He admitted, however, that he had not examined the particular fastenings to see their character.

This witness, in reference to his experience as to such subjects, stated as follows:

"At the time this coal was taken by the Sheriff I was assistant to Dunlap, Deputy Sheriff; I had been in freight-ing establishments from 1837 to 1844, where we had ves-

Moore v. Westervelt.

sels running from Hudson to New York ; I had been clerk on board of a steamboat for some three years ; I had charge of the mooring of the vessel when the captain was off ; he did not leave that altogether to my charge, but to the pilot's and mine ; I think I understood it." * * * *

Q. What kind of hawsers was the vessel fastened by ? were they the kind usually used for that purpose ?

A. I should judge they were ; a large rope.

Q. Please to state what was the condition of the fastenings of this vessel as to safety ?

This question was objected to on the ground that it was not a question of science, and that the Jury were just as competent to judge of it as the witness. The objection was overruled, and an exception taken.

A. I should judge that she was safely moored.

Q. By the Court : You mean to say that the fastenings were proper fastenings for a vessel in that condition ?

A. Yes, sir. I have seen vessels, time and time before, moored in the same way.

The vessel lay to the north of the wharf on the East River, to which she was fastened, which ran at right angles to the bulkhead of the mainland ; and in that position she was exposed to the force of a northeasterly wind, which was that which prevailed in the storm which sunk her ; on the south side of the pier she would have been greatly protected from such wind. An expert for forty years who was examined as a witness for the defendants (Capt. Cole), testified that he knew all about the piers, and had " seen " how storms act. In laying up a vessel in good weather " a man does not generally expect a storm from either " way ; " * * * " consequently will as soon lay his vessel " on one side as the other." That a storm in September would blow " more likely from the south than the north " at that season of the year ; that no greater danger would " be incurred from mooring a vessel on the north than the " south side of the pier ; " that the wind often changes its direction in a storm, from northeast to southeast. That it was not usual to have a very severe September gale in

Moore v. Westervelt.

New York. He was corroborated by another witness, (Earl). The vessel's keeper testified that the wind was blowing quite "heavy" two days before the sinking of the vessel; it was likely to prove a pretty heavy storm; on the next day "it was a very heavy line gale, a "September line storm and a very heavy one too." The captain stated, "It was a pretty hard storm." A witness who bought and raised the sunken vessel, (Simpson,) testified, "the gale was very severe on that side of the "river, the tide was eight or ten inches higher than in the "gale of 1847," and that "if she had all the fastenings on "in New York, the probability is she would have sunk, "the cause of her sinking was the effect of the storm, she "being so much out of repair and very heavily laden."

Capt. Cole also testified that it would be dangerous trying to move a vessel laden to the water's edge, round a pier when a gale is blowing hard enough to sink it; "it "would be very likely, (if not to knock a hole in her,) to "wash the water on her deck so that she might fill and "sink, deeply laden as she appeared to be." Another witness (Earl) stated, that in a northeast gale it would not be safe to take a vessel round a pier, from its north to its south side, "the current would be so strong and the swells "so large, that it would be apt to force her against the "dock, and probably jam a hole in her side, or break over "and sink her, if she was heavy laden."

The vessel sank precisely at the spot where she lay, and remained parallel to the wharf when she was raised; which, as the plaintiff admitted, was pretty nearly straight.

The Court instructed the Jury "that it was the duty "of the Sheriff to take such steps to insure the safety of "the coal as a careful and prudent man of good sense and "judgment, well acquainted with the condition of the vessel, and its location with regard to exposure to storms, "and, having all the power of the Sheriff in the matter, "might reasonably have been expected to take had the "coal belonged to himself," and if they came "to the conclusion, that the Sheriff did not take that degree of

"care for the preservation of the coal" which he had "thus indicated, and that the injury was occasioned by the negligence of *the defendant and his officers*," the plaintiff would be entitled to a verdict. And he further "instructed them that "if such an owner as he had indicated would have taken the coal from the vessel, as it lay at the wharf in the first instance, the Sheriff was bound to do it. He was bound to know the condition of the vessel; whether it leaked, whether it was seaworthy for the place in which it lay, how deeply laden, everything in regard to it, and he was bound to put on board the vessel, if necessary, such men as would pump her out and keep her in a condition to insure the safety of the coal."

The plaintiff's counsel requested the Court to charge the Jury :

First. That the Sheriff was bound to take more than ordinary care of this property, and if for want of more than ordinary care the property was lost, he is responsible.

Second. That if the sinking happened from want of due caution, either by the Sheriff, Deputy Sheriff, captain, mate or hands of the vessel, then the Sheriff is responsible.

Third. That the Sheriff was responsible for the negligence of the master and crew after he took possession.

Exceptions were taken by the plaintiff's counsel to the alleged omission of the Court to charge each of such propositions.

The Court also charged the Jury, "that if a prudent man, in the case of his own vessel, would not have removed her in the storm, the Sheriff would not be bound to."

To this instruction the counsel for the plaintiff also excepted.

The Jury found a verdict for the defendants, upon which judgment was entered. A motion for a new trial on the Judge's minutes was made at Special Term, and denied, by an order, from which, as well as from the judgment, an appeal was now taken.

Moore v. Westervelt.

Daniel Lord, for plaintiff, appellant.

I. The Sheriff was bound, by the express terms of the statute, to keep the property in a secure place, and had a lien on it, not only for his own fees, but all necessary expenses.

1. This obligation is official and statutory, and at least as great as that of a common carrier, and only subject to the same exception of inevitable accident from act of God.

2. A carrier is not exempted simply from a loss by act of God, unless it appears that he has done his whole duty in protecting the property from its peril.

II. The question as to the safety of the vessel from the condition of the fastenings, and the judgment of the witness thereupon, and the question of the Judge thereupon, were all objectionable, and formed a mistrial.

1. It was a mere opinion of the witness, who had not seen the vessel nor had been present at the time of the peril, and an opinion on a subject of common knowledge, and not of science.

2. The Judge's question was leading.

3. It was irrelevant, for the evidence did not show a loss from a defect of fastening.

III. The Sheriff was bound to take more than ordinary care of this property, and if lost for want of more than ordinary care, he is liable.

IV. The Sheriff was liable from the want of due caution, whether in the Sheriff, deputy sheriff, captain, master or hands of the vessel.

1. The charge was, if the Sheriff or his officers were without fault, the verdict should be for the defendant. This relieves the Sheriff from the negligence of the persons left with the vessel in charge of the cargo.

2. When again more specifically requested to charge on this simple proposition, the Judge did not so charge.

The plaintiff was entitled to such a charge as he requested. (See this case in the Court of Appeals, 21 N. Y. R., 105, 106; Also this case, 2 Duer, 59; 1 Bosw., 357.)

V. The verdict was against evidence, clearly and palpably.

Edwards Pierrepont, for defendant, respondent.

I. The charge of the Court is in accordance with settled law, and quite as favorable to the plaintiff as the law or the facts would warrant. (*Moore v. Westervelt*, 21 N. Y. R., 103.)

II. The case clearly shows that there is no meritorious cause of action, and to us it seems not an action in good faith by the plaintiff.

III. The presumption of law always is, that the Sheriff, in execution of legal process, has done his duty, and negligence of the Sheriff must be proven as matter of fact before the plaintiff can recover.

IV. The fact that there was no negligence on the part of the Sheriff has been found by the Jury on four different trials, and the evidence abundantly sustains that finding. On this trial much new and additional evidence was given on the part of the defendant.

V. There was no negligence on the Sheriff's part, and the verdict is clearly sustained by the evidence.

VI. Four several Juries have concurred in the verdict that the defendant was not guilty of the neglect charged. (*Ex parte Baily*, 2 Cow., 479; *Fester v. Whipple*, 8 Johns., 369; *Fowler v. Etna Ins. Co.*, 7 Wend., 270.)

BY THE COURT—ROBERTSON, J. The question of the admissibility of the question put to Hallenbeck, the ship's keeper, an expert, as to his judgment on the sufficiency of the fastenings, must be determined before examining the charge. Some degree of professional knowledge had been previously testified to by him; and also that he should judge the hawsers used were those usually employed—a large rope; and he certainly was competent to give an opinion as to their safety. It clearly was a subject of science and experience, and not of common knowledge; one of the fastenings seems to have broken; the plaintiff

had a right to prove that it was sound in the first place, and that such danger was properly provided against. The question was, therefore, properly admitted.

The substance of the objections to the charge is, that the Judge confined the degree of care to be exercised by the defendant to that which a prudent man would exercise in regard to his own property, and did not charge that the neglect of the persons on board the vessels was imputable to the defendant.

In regard to the first point, we are bound to adhere to the views expressed by this Court at General Term, when the case was formerly before it, (1 Bosw., 357,) which limited the degree of care required to that which was stated in the charge on the present trial. (Story on Bailments, § 130.) Those views were not disapproved of by the appellate Court, (*Moore v. Westervelt*, 21 N. Y. R., 105,) which has since and lately thrown considerable doubt upon the existence of any practical distinction between ordinary and extraordinary care in regard to bailees for hire, as in the case of common carriers, in the case of *Wells v. N. Y. Central R. R. Co.*, (24 N. Y. R., 181, decided at their last term,) pronouncing it "illusory and impracticable."

The request in regard to the neglect of the master and crew does not appear to me to have been put in a form which required a compliance with it. Omitting that part of it which relates to the defendant, which it is conceded was granted, it amounted to a request to charge, that the omission by such master and crew to take the necessary means for the safety of the vessel, made the defendant responsible; that it clearly did not, if he or any other person took the proper precautions, and if not only they but the whole world omitted them, he clearly was liable. Neglect is negative conduct, and the defendant's responsibility depended on the omission by everybody to take the proper measures to insure safety, not that of any particular individuals. The plaintiff was entitled to have the Jury instructed, either that the defendant was bound to adopt such means, or that the failure to employ them by

all the world made him liable; for if any one used them, he was entitled to the benefit of that use. If the object of the request was, as seems to be contended, that the defendant did not discharge his duty by leaving the vessel in the charge of the captain and crew, as held by the Court of Appeals in the case, it should have been made in terms less likely to be misunderstood. But even if negligence could be conceived to be a positive act, the charge that the defendant would be responsible, if the loss was caused by his negligence, seems to me to cover the case. The master and crew were, as held by the appellate Court, his agents under the circumstances, and he was responsible for their conduct; their negligence was his. If there was any doubt that the Jury would so understand their relation and its effect, the request should have been directed to that point in less ambiguous phraseology; because, as it stands, it is that if the neglect of such agents, as one of the alternatives, caused the loss, the defendant was responsible; and there is no pretense of any positive acts on their part to increase the danger. The defendant was responsible, if at all, for the neglect of the whole world, including himself, and not for that of any particular individuals. The third request equally falls short of the requisite exactness to reach the end proposed, if it were that now contended for; it was "that the Sheriff was responsible for the negligence of the master and crew."

The learned Judge instructed the Jury, that if the defendant did not take the degree of care which the Judge had indicated, and the injury was caused by such negligence, the plaintiff was entitled to a verdict. How mere negligence of the agents was to make the liability of their principal, arising from his own want of care, greater or less, I cannot discover. The learned Judge even went so far as to charge that the defendant "was bound to *put on board such men as would pump her out and keep her in a condition to insure the safety of the cargo,*" thus fully defining his obligation.

Moore v. Westervelt.

The verdict should, therefore, not be interfered with by reason of any improper refusals to charge.

But it is said the verdict of the Jury, even if the charge was correct, was contrary to the evidence, or the weight of it, and that the defendant utterly failed to discharge any obligation incumbent upon him; and that is based principally upon the ground that nothing was done by any one, to save either vessel or cargo.

The liability of the defendant, turns generally upon the question, whether he kept the cargo, which is the subject matter of the action, "in a secure place," within the meaning of the 215th section of the Code, as well as discharged his duty as a bailee for hire and public officer charged with the possession of the goods seized by him as Sheriff. The highest Court of this State, in passing upon a former judgment in this action, held, that the defendant was not necessarily bound to remove the cargo out of the vessel, unless it was unsafe there, (*Moore v. Westervelt*, 21 N. Y. R., 105,) but he was bound to take a certain degree of care in protecting and securing it while in his custody on board of such vessel, what that degree of care was, was not adjudicated.

Being thus bound to see that the place of deposit was in itself safe, if it floated, he was bound to see that it was properly moored, secured and fastened, against all ordinary perils of winds and waves, and if necessary, protected against any storm or gale, after it arose, by every means within his reach, which a prudent man would use for the purpose, either by removing the vessel to another place, or otherwise. Complaint is made, in this case, first, of the character, condition and fastenings of the vessel itself, and its exposure to storms coming from the quarter from whence that which sunk her did; and, secondly, of the neglect to change her position after the storm commenced. Of course, if the storm was of a kind and from a quarter, which previous experience had taught might be expected, and the position of the vessel was such as not only to expose it to such storm, but also to prevent its

withdrawal after the storm had begun, the defendant would have been guilty of neglect in leaving it in that position. Or if the condition of the vessel, as to its lading or leaking, was such that it could not resist the force of the storm as well as if it had been lightened or pumped, or the leaks stopped, and the defendant neglected to use any proper measures to produce those results, and such neglect made her more easily a prey to the storm; or if, after the commencement of the storm, he could have caused anything to be done to protect such vessel from its violence, by removing it, or increasing its fastenings, or otherwise, and did not do so, he was equally negligent. Upon these points it may therefore be necessary to examine the evidence; but the defendant would not be liable if the storm was one of a violence so unusual as not to have been reasonably expected; or if it was impossible to remove the vessel to a place where she would not be as much exposed to storms of equal violence from another quarter; or if she was so situated as to be incapable of being withdrawn from the effects of a storm of ordinary violence from the same quarter, after it had commenced; or if she was so kept clear by pumping as that her cargo or any leak did not increase her danger or render her unmanageable, and nothing could have been done within a reasonable time after the storm commenced, by removing the vessel out of its reach, or increasing her fastenings, to save her.

Both parties, in this case, seem to have been willing to trust the case to the Jury, upon the general charge of the Court, as to the degree of care to be exercised by the defendant; the state of affairs in which he would be bound to remove the cargo in question, or put men on board to pump the vessel out and keep her in a condition to insure its safety. There was no request for specific instructions as to the character of the storms against which provision was to be made, or the nature of such provision, or the duty of the defendant in regard to removing or protecting the vessel after the storm had begun; so that it was left

Moore v. Westervelt.

entirely to the Jury's discretion to determine, according to their uninstructed views of the defendant's duty, whether he had performed it or not. The plaintiff, after making that experiment, cannot now, in fairness, ask, upon a critical examination of the evidence, that such verdict should be set aside, merely because the Court may take a different view of the defendant's conduct.

It certainly cannot be denied that the agents of the defendant did not seem to have had a very clear idea that he was responsible for anything except for the safe keeping of the coal, or if he chose to make the vessel in which it was, his place of deposit, was bound to do anything to protect it against winds and waves or other accidents, nor that the defendant took any additional precautions against them. But this is wholly immaterial, if nothing could have been done to save the vessel. It is true, an omission to make an attempt to do, what to an unlearned mind may seem likely to accomplish an end, may have its weight with an equally unlearned Jury; but when experts pronounce such efforts futile, we are bound to yield to their judgment. The Jury in this case must have been satisfied that nothing could have been done to save the vessel, even by an owner stimulated by the fear of loss, and therefore the reason why nothing was done was immaterial. It would be unprofitable, therefore, to enter into speculations of possibilities, when we have realities before us.

So, too, the heavy lading and leak of the vessel, if, as it would appear by the testimony, they prevented it from being safely removed to a place of shelter, or increased the peril of that removal, might be a reason why the defendant should not have left it in a place of danger; but the testimony shows that human foresight could not determine from what quarter the danger would come, and the probabilities were that it would come from a quarter against a gale from which the pier was a shelter. Against the leak, which was not formidable before the gale, protection was given by the use of the pumps. It is true, the defendant might have exercised greater care in taking out

Moore v. Westervelt.

the excessive part of the cargo, before the storm, if he had had any reason to anticipate it, but the Jury had a right to determine that storms did not occur with such certainty, as, in view of the reasons sanctioned by the Court of Appeals for retaining the same depository, should call upon him to make the change; and the Jury has determined he did all a prudent man was likely to do in his own case.

The defendant having made out a *prima facie* case of destruction by overpowering and not to be expected force, it lay with the plaintiff to show that something could have been done when the attack came, to resist it, or rescue the vessel from it; the evidence in this case, certainly does not go to that extent. The Court is not at liberty to conjecture she might have been saved by going round the pier or across the slip. The Jury, with perhaps equal if not greater experience, have determined she could not, by deciding that a prudent man would not have tried it; and it would be improper for us to say, in the face of the evidence of the violence of the storm, they were wrong. The Court would not have been warranted in instructing the Jury that the defendant was bound to have made the attempt in the absence of all evidence that the expected action was feasible: what there is goes to prove it was not.

Without undertaking to say that the evidence establishes that the defendant did all that a prudent man would have done, to provide for contingencies in case anything could have been done, we merely mean to hold that there was no such overpowering evidence that anything should have been done beyond the measures taken to secure the vessel, in the first place, or after the wind commenced to increase, or that anything could have been done to save her when the storm had grown to a gale, as to warrant our setting aside the verdict for that reason.

The judgment must be affirmed, with costs.

Judgment accordingly.*

* On appeal to the Court of Appeals the judgment was affirmed, 35 How. Pr., 371.

CHARLES MALLORY *et al.*, Plaintiffs and Respondents,
v. RICHARD F. PERKINS *et al.*, Defendants and Appel-
lants.

1. In order to exclude a question which calls for the opinion of a witness, for the reason that he has not been shown competent as an expert, such reason must be specified in the objection. A general objection is properly overruled.
2. Declarations or admissions in respect to the stowage of a cargo, made by a stevedore while employed by the owner of the cargo to stow it, are not admissible in evidence against the owner.
3. The testimony of a witness as to a matter of fact is not affected by proof that he was a public officer required by law to make a record of the facts in question; and that such record, as originally made by him, did not include a statement contained in his oral testimony. Hence, proof of the alteration of the record by subsequent insertion of such statement is inadmissible to contradict his oral testimony.

(Before MONCRIEF, ROBERTSON and MONELL, J. J.)

Heard, October 7; decided, November 29, 1862.

THIS action was brought by Charles Mallory, Charles H. Mallory, David D. Mallory and George W. Mallory against Richard F. Perkins and Charles Stern, to recover for freight for the transportation of some casks of wine and brandy on a voyage from San Francisco to New York. The defense was the loss of the contents of two of such casks of wine, by leakage produced by improper stowage, and not by dangers of the seas.

The cause was tried before Mr. Justice WOODRUFF and a Jury, on the 19th of December, 1861.

On the trial, the delivery of the casks shipped, to the defendants, was admitted, and before any proof was given of their good order or condition, a motion was made by the defendants to dismiss the complaint, because no such proof had been given. Evidence was subsequently introduced of their condition and the cause of the leakage.

The master of the vessel was examined as a witness for the plaintiffs. He testified, without objection, that the casks in question were "well and properly stowed," and were "not disturbed, removed or displaced after they

Mallory et al. v. Perkins et al.

"were" so stowed; and that he had been a shipmaster seven years, and sailed as mariner sixteen. He was cross-examined as to their mode of stowage, the weather on the voyage, and their mode of delivery. Several questions were also put to him on his cross-examination, as to his opinion in regard to different modes of stowage, and the proper one, in reference to which he said that the safety depended on the strength of the casks. He was then asked the following questions on his redirect examination: "If wine casks are damaged in stowing them four deep, what would that indicate in reference to the quality of the casks?" and "If casks take damage by so filling the ship, what does that indicate in reference to the fitness or quality of the cask?" These questions were objected to generally, but admitted under exception.

One of the defendants (Stern) being under examination as a witness on their behalf, was asked, what was said by him to the stevedore who was stowing them, in reference to the casks in question, at the time they were put on board; and by such stevedore to him? and, also, in what manner he called the attention of such stevedore to such casks, and what he said to him? all of which questions were excluded, under an exception.

The defendants' counsel read in evidence a copy of a survey made by one of the wardens of the port of New York, (Hutchinson,) on such vessel, and reduced to writing, dated on the 18th of December, 1861. This stated, among other things, that, on the 20th of February, 1861, he "surveyed the cargo on board of this vessel, ground tier, and found stowage good and dunnage ample. * * * Found Perkins & Stern's cask near empty, by leaks at chimes, caused by being crushed on the bed, by pressure of cargo; same mark, one cask a little out, from same cause; this cask had settled so much on the bed, that the board on which the bed rested had flattened the bilge; N. Y. one cask, part out, leaking at chime." At the end of the copy survey were two lines, as follows: "All the casks that were leaky were weak, and hoops

"slack and not sufficient to bear the pressure." As to those two lines the production of the original entry was required.

Hutchinson, the warden who made the survey, was examined as a witness by the plaintiffs, and testified as to the condition of the casks in question, without the aid of the survey. After he had left the stand, he was recalled by the defendants' counsel, and the original report of his survey shown to and identified by him, and he testified that the last two lines were written by him, and his best impression was that he wrote them when he wrote and signed his report; and the entire report, including those two lines, was made by him, "as one transaction, and "without any intimation or dictation by any one." Upon which the defendants' counsel read the original report.

The defendant, Stern, being recalled, the following question was put to him, and excluded: "Did you, after the "delivery to you of these twenty-two casks, go to the port "wardens' office and examine their entries?"

The defendant, Stern, testified that neither of the casks was weak or inferior. A cooper who cut up the empty one, testified that it was strong. The warden testified that they were insufficient. The master of the vessel testified that they must have been so to have been injured by the pressure. And another witness thought they looked in good condition when put on board.

The Judge charged the Jury, that if the damage to the casks was owing to want of proper strength in them to endure the ordinary pressure to which casks are subject on such a voyage, liable to encounter the gales which had been spoken of by the master of the vessel, as having been met with on the voyage, the plaintiffs were not responsible for the loss of the wine.

The Jury found a verdict for the plaintiffs for the full amount of the freight claimed by them, and judgment was entered thereon. An application was made for a new trial, at Special Term, which was denied; from the order

denying which, as well as from the judgment, the present appeal is now taken.

James Eschwege, for defendants, appellants.

I. The Court erred in denying the motion made by the defendants to dismiss the complaint.

II. The Court erred in admitting the conclusions of the master. 1. It does not appear that he is an expert. 2. The opinion which he gives is not based upon facts, but upon inference. 3. It was the exclusive province of the Jury to draw the conclusion from the alleged good stowage and established damage, and not of the witness, the sufficiency of the casks being the very point in issue. (1 Phillips on Ev., [1859,] p. 779, and cases cited, note 2; *Id.*, pp. 781, 784; *Taylor v. Monnot*, 4 Duer, 121; *Ramadge v. Ryan*, 9 Bing., 335.) 4. The witness did not state facts, but his inferences and conclusions drawn from such alleged good stowage and established damage to the casks, which was improper. (Best's Prin. of Ev., 384, § 344; *Paige v. Hazard*, 5 Hill, 603; *Morehouse v. Mathews*, 2 Comst., 514; *Dewitt v. Barley*, 5 Seld., [9 N. Y. R.,] 371; *Dickinson v. Barber*, 9 Mass. R., 225.)

III. The Court erred in excluding the declarations made by Cooty, the stevedore, to the defendant Stern, at the time the casks were being loaded on board the vessel.

Cooty was the agent of the plaintiffs for the purpose of receiving and stowing, as part of the general cargo, the casks in question.

And as such it came peculiarly within the scope of his authority to receive or reject casks as sufficient or insufficient.

And the declarations of such agent, made within the scope of his authority, and part of the *res gestæ*, bind the plaintiffs, and are admissible as evidence.

Such declarations are not hearsay, but original evidence, and should have been admitted. (1 Phil. on Ev., [1859,] p. 507; Dunlap's Pal. on Agency, p. 273, note 1; *Prior v. Powell*, 3 Comst., 322; *American Fur Co. v. United States*,

Mallory *et al.* v. Perkins *et al.*

2 Peters, 358; *Perkins v. Burnet*, 2 Root, 20; *Mather v. Phelps*, Id., 150; *Miller v. South Car. Ins. Co.*, 2 McCord, 336; *Campbell v. Williamson*, 2 Bay, 237; *Higgins v. Solomon*, 2 Hall's Sup. Ct. Rep., 482, 487, 488; *McCotter v. Hooker*, 4 Seld., 497; *Baring v. Clark*, 19 Pick., 225; and see *DeMott v. Laraway*, 14 Wend., 225.)

IV. The Court erred in excluding the offer to show that the book of the port wardens, and which had been put in evidence, had been examined by Stern. Although a party cannot be allowed to impeach his own witnesses, he may nevertheless, prove on the merits, by independent testimony, the truth of any particular fact, in direct contradiction to the testimony of the witness. (*Thompson v. Blanchard*, 4 Comst., 303.)

V. The verdict is clearly against the evidence.

I. T. Williams, for plaintiffs, respondents;—

Cited, as to the admissibility of the master's opinion of the casks, *Crowell v. Kirk*, (3 Dev., 356,) *Cortis v. Little*, (1 Green, 232,) *Ramadge v. Ryan*, (9 Bing., 333,) *Malton v. Nesbit*, (1 O. & P., 50,) *Jameson v. Drinkald*, (12 Moore, 148, 157,) *Davis v. Mason*, (4 Pick., 156, *et seq.*) And as to the admissibility of the declarations of Ooty, the stevedore, *Governor v. Barkley*, (4 Hawkes, 20,) *Healy v. Jacobs*, (2 Car. & P., 616.)

BY THE COURT—ROBERTSON, J. The evidence of the condition of the casks in question being subsequently supplied, cured any error in refusing to dismiss the complaint for want of it. (*Murray v. Judah*, 6 Cow., 484, 499.)

The objection to the inquiry made of the master of the vessel, of his opinion of the quality of the damaged casks was also properly overruled, because no ground was specified for it. Proof of the probable strength of such casks, in view of their stowage and condition after the voyage was admissible in the cause. If the witness was incompetent to give the testimony, by not being established to be an expert, the objection should have been put on that

ground ; because the defect might have been remedied on the spot. (*Doane v. Eddy*, 16 Wend., 522.) In many, if not all cases, the nature or ground of an objection to testimony should be stated. (*Jackson v. Hobby*, 20 Johns., 357; *Rhoad v. Deifendorf*, 5 Barb., 388; *Ohio Insurance Co. v. Edmonstone*, 5 Miller, 295.) Parties have no right to lie by until an appeal before disclosing the ground of their objection. (*Ward v. Whitney*, 8 N. Y. R., [4 Seld.,] 442; *S. C.*, 3 Sandf., 399; *Roberts v. Carter*, 28 Barb., 462; *Sheldon v. Wood*, 2 Bosw., 267; *Union Bank of Sandusky v. Torrey*, 2 Abbotts' Pr., 271, note.) Where evidence is conditionally admissible, parties should be held to have waived the compliance with the condition, where they do not state a non-compliance with it as a ground of objection. The right of objecting is not given with a view of laying a trap for an adversary, but enabling a party to exclude all but the best evidence, if it can be had.

This view renders it unnecessary to discuss the questions, whether the master of a vessel, who has had seven years' experience, is a judge of the strength of casks, or whether the prior interrogation of him by the objecting party, in reference to similar matters, is an admission of his competency.

The conversation between the stevedore and one of the defendants (Stern) was also properly excluded ; the stevedore may have been the owners' agent to stow the cargo, but this would not give him authority to admit away his rights, even in regard to such stowage ; and if it was intended to prove any notice of anything peculiar about the casks, which required more care in their stowage, the question was not sufficiently pointed.

It is difficult to understand for what purpose the condition of the entries in the port wardens' office, in relation to the cargo in question, was introduced. The defendant himself introduced a copy of the survey in evidence, reserving the right of producing the original as to the last two lines. He next attempted to prove by Hutchinson that those two lines were added after the survey.

Therlott et al. v. Bagiol.

was made out. I am at a loss to understand how the addition of such statement after a prior admission of it, affected the witnesses' testimony. He did not testify by the survey, but independently of it; his omission in making a memorandum, therefore, of a fact, would not shake his oral testimony of its occurrence, and still less would tend to disprove it.

The weight of testimony was against the ability of the casks to resist the pressure and straining, incident to a voyage. The examining port warden and the master thought they were unable to do so. The defendant Stern, and the cooper, thought they were strong, but how strong did not appear, and another witness thought that they looked in good condition when put on board. The verdict of the Jury on that question ought not to be disturbed.

The judgment and order denying a new trial should be affirmed with costs.

Judgment accordingly.

**AUGUSTUS B. THERLOTT *et al.*, Plaintiffs and Respondents,
v. ANTONIO BAGIOLI, Defendant and Appellant.**

1. Tradesmen who sell goods to a wife upon her husband's account, after notice from him not to do so, cannot recover from him therefor, unless they show a subsequent promise by him to pay, or that the goods sold were necessary and suitable to her condition in life, and that she was not otherwise provided for by her husband.
2. If the husband has given such notice, the burden of proof is upon the plaintiffs, to show that the goods sold were necessary and not provided by the husband.

(Before MONCRIEF, ROBERTSON and MONKELL, J. J.)

Heard, October 7; decided, November 29, 1862.

THIS was an appeal from a judgment recovered by the plaintiffs.

The action was brought by Augustus B. Therlott and Chauncey D. Hurd, assignees of John Beck and William

Therriott et al. v. Bagioli.

Beck, to recover for goods sold to the wife of the defendant, after having been notified not to sell to her on the account of the defendant.

The goods were sold in 1857, and consisted of articles of female apparel, amounting to \$228.13.

The cause was tried before Mr. Justice MONCRIEF and a Jury, on the 19th of March, 1862.

Reed, the plaintiffs' witness, testified that he presented the bill to the defendant in 1858; that he looked at it and said, "In two years I will pay that." This was afterwards repeated. The plaintiffs gave evidence, which was admitted without objection, that Mr. Beck (plaintiffs' assignor) told witness that defendant had directed the goods to be sent.

The defendant testified, on his own behalf, that upon the occasion of paying a bill to Beck & Co., in April, 1857, he told them it was the last money he should pay them, and that he did not want them to trust his wife more. Subsequently, he says, he went to Becks' store, and told them he would not pay any more bills; he said: "If you like to give Mrs. Bagioli goods, give them to her, but not on my account." He denied that he made the promise to pay, testified to by Reed, and said that for the last ten years he had provided his wife with all things necessary for her.

The defendant was asked whether, prior to the date of the bill in suit, he furnished his wife with the necessary articles requisite for her comfort in her station of life. The question was objected to, and excluded by the Court. The defendant excepted.

The defendant's counsel requested the Court to charge the Jury: 1st. That if the articles in question were sold to the wife, after notice by defendant not to trust the wife on his account, the plaintiffs cannot recover, unless the defendant subsequently promised to pay for them; and, 2d. That the burden of proof whether the defendant did or did not furnish his wife with articles suitable to her condition in life, was upon the plaintiffs. The Judge

Theriot *et al.* v. Baglioli

refused to charge either of these propositions, and the defendant excepted.

The Judge put the case to the Jury in two aspects: 1st. The goods being sold and delivered to Mrs. Baglioli, and the bill being afterwards presented to the defendant, whether or not he promised to pay the amount of it. 2d. Whether the goods were necessary and suitable to the condition in life in which Mrs. Baglioli lived.

An exception was also taken to a part of the charge, which will appear in the opinion of the Court.

The Jury found for the plaintiffs.

Stephen B. Cushing, for defendant, appellant;—

Cited 2 Kent Com., 146, 9th ed., p. 134; *Etherington v. Parrot*, (1 Salk., 118; 2 Lord Raym., 1006;) *Montague v. Benedict*, (3 Barn. & Cress., 631,) *Blowers v. Sturtivant*, (4 Den., 49,) *Renaux v. Teakle*, (20 Eng. L. & Eq., 345), *Clancy*, 23.

S. B. H. Judah, for plaintiffs, respondents;—

Cited 4 Wend., 465; 4 Barb., 222; Bac. Abr., Tit. Baron and Femme, let. H; 1 Campb., 120; 5 Seld., 207; *Etherington v. Parrot*, (Salk., 118;) 2 Smith's Leading Cases, 279; 28 Law Lib.; Notes to *Seaton v. Benedict*; *Rotch v. Miles*, (2 Conn., 638;) 2 Halsted, 142; 2 Strange, 1214.

BY THE COURT — MONELL, J. I think the learned Justice erred, in refusing to charge, as requested in the two propositions submitted by the defendant's counsel. The defendant, the husband of Mrs. Baglioli, had given notice to the Messrs. Becks not to sell his wife any more goods on his account. Of this there was no dispute. The notice was given before the goods were sold, and the sale was made by the Becks, with full knowledge that the defendant would not be responsible, unless they could obtain a subsequent promise to pay, or be able to make it appear that the articles furnished were necessary and suitable to her condition in life, and that she was not otherwise pro-

Therlott et al. v. Bagioli.

vided for by her husband. The husband is bound to provide his wife with necessaries, suitable to her situation and his condition in life. He is bound by her contracts, for ordinary purchases, from a presumed assent on his part; but if his dissent be previously made known, the presumption of his assent is rebutted, and he is not liable, unless the seller shows the absolute necessity of the purchase, for her comfort. (*Etherington v. Parrot*, 1 Salk., 118; *Ld. Raym.*, 1006.) This doctrine is fully recognized in this country, and is believed to be founded on principles of justice. (2 Kent. Com., 146, 9th ed., p. 134; *Mott v. Comstock*, 8 Wend., 544.) Hence, the Jury should have been told that if they believed the defendant had given notice not to sell to his wife on his account, they must, to entitle the plaintiffs to a verdict, find, either that the defendant had promised to pay, or that the goods were absolutely necessary for her comfort. So far from this, the learned Justice had previously excluded the inquiry of the defendant, whether he did not furnish his wife with the necessary articles, requisite for her comfort, and no evidence was given or offered by the plaintiffs, that the goods in question were necessary.

The Judge did, however, charge, that if they did not find the promise to pay, and found that the defendant had given the notice not to trust his wife, then they were to inquire whether the goods were suitable and necessary to the condition in life in which Mrs. Bagioli lived. "*Because,*" says the learned Justice, "*it does not appear that the defendant furnished his wife with any articles for her use.*" And if they found they were suitable and necessary, the defendant was liable, although he had not promised, and had made his dissent previously known.

The theory of the charge was that the defendant would be liable, although he had given the notice, if the Jury believed the articles were necessary, and that the defendant must show that they were not necessary, and not the plaintiffs that they were. There was no evidence from which the Jury could determine the suitability of the

Theriot et al. v. Baglioli.

goods to the condition in life of Mrs. Baglioli. The plaintiffs had proved nothing on that subject, and the defendant was not permitted to disprove it. A concurrence by the Jury that the articles were necessary, would have been, not only unsupported by evidence, but clearly against the evidence.

As the case stood at the close of the evidence, I think the defendant was entitled to a verdict. But the view I have taken of the other questions renders it unnecessary for me to say whether the motion to dismiss the complaint came too late.

I am clearly of opinion that the learned Judge erred, both in refusing to charge as requested by the defendant's counsel, and in charging, as he did substantially, that the burden of proof that the articles were not necessary, was on the defendant.

For these reasons I think the judgment should be reversed and a new trial granted, with costs to abide the event.

Order accordingly.

CASES OF PRACTICE
AND
DECISIONS IN SPECIAL PROCEEDINGS,
AT THE
GENERAL AND SPECIAL TERMS
AND AT CHAMBERS.

**GEORGE CARTER, Plaintiff and Appellant, v. FREDERICK
KOEZLEY, Defendant and Respondent.**

1. It is essential to the sufficiency of an answer stating new matter as a defense, that it state facts which, if true, will bar the action, or so much of it as is attempted to be answered.
2. In an answer setting up title or right of possession to land, under a sale for taxes, it is not enough to allege that the property was duly sold for non-payment of a tax duly imposed according to the statute. It is essential to state facts showing that a tax was duly imposed on the property, for the non-payment of which the authorities might lawfully sell it, and that the proof of non-payment required by the statute to authorize a sale, had been made.
3. An answer, which is defective in this respect, is not aided by section 161 of the Code of Procedure, which authorizes pleading a judgment or other determination of a Court or officer of special jurisdiction, by stating that it was duly given or made, without stating the facts conferring jurisdiction. If the imposition of a tax could be deemed to be within this provision, the answer should designate by whom the tax was imposed.

(Before all the Justices.)

Heard, December 7, 1861; decided, December 21, 1861.

THIS was an appeal from an order overruling a demurrer to an answer.

The action was brought to recover possession of a lot

Carter v. Koezley.

of land in Eighty-third street, in the City of New York, with damages for withholding possession.

The answer interposed, in addition to a general denial, two defenses, the purport of which is sufficiently stated in the opinions. To these defenses the plaintiff demurred, on the ground that they were insufficient.

At Special Term the demurrer was overruled, the Court holding that it is needless to set forth the whole chain of facts necessary to be proved, citing *Gihon v. Levy*, (2 Duer, 180.) From the order entered on this decision, the plaintiff appealed.

John Townshend, for the plaintiff, appellant.

I. Section 162 of the Code does not apply, and the former rule should govern.

II. An answer must contain, * * * a statement of new matter constituting a defense. This is imperative, (*McKyring v. Bull*, 16 N. Y. R., 297,) and the statement must be of all those facts which defendant must prove to defeat a recovery. (*Catlin v. Gunter*, 1 Duer, 266; *Manning v. Tyler*, 21 N. Y. R., 567.) That the answer would entitle the defendant to prove his case on a trial, does not make it sufficient. (*White v. Spencer*, 14 N. Y. R., [4 Kern.,] 248; Voorhies' Code, 227, f, 229, a; *Smith v. Lockwood*, 13 Barb., 209; *Hatch v. Pest*, 23 Id., 575; *Farrington v. Morgan*, 20 Wend., 207.) The facts must be set forth, so that the Court can determine whether they constitute a defense. Alleging that an act was duly done, alleges no fact other than the doing. "Duly" expresses no fact. (*Graham v. Machado*, 6 Duer, 517; *Myers v. Machado*, 14 How. Pr., 149.) All the cases in which the allegation that an act was "duly" performed has been upheld, are cases where the word was mere surplusage, and where the allegation would have been sufficient without it, but, perhaps, uncertain. (*People v. Walker*, 23 Barb., 304; *People v. Ryder*, 12 N. Y. R., [2 Kern.,] 433; *Fowler v. N. Y. Indemnity Ins. Co.*, 23 Barb., 143; *Woodbury v. Sackrider*, 2 Abbotts' Pr., 405; *Seré v. Coit*, 5 Id., 482; *Farmers' Bank v. Empire Stone Dress. Co.*, 10

Cartier v. Koenig.

Abbotts' Pr., 47; *French v. Willet*, 10 Id., 102; *Scrantom v. Farmers' Bank of Rochester*, 33 Barb., 527; *Stewart v. Beebe*, 28 Barb., 34.) Such cases afford no ground for demurrer; but when the word "duly" is put in lieu of some traversable fact not stated, it is no excuse for the omission, and the pleading is demurrable. (*Dayton v. Connah*, 18 How. Pr., 326; *White v. Joy*, 3 Kern., 86; *Chautauque Co. Bank v. White*, 2 Seld., 236; *Bangs v. McIntosh*, 23 Barb., 591; *Myers v. Machado*, 6 Abbotts' Pr., 196; *Hulburt v. Young*, 13 How. Pr., 414; *Graham v. Machado*, 6 Duer, 517.)

III. It might be sufficient to state enough to show jurisdiction to sell, and allege *taliter processum fuit* that a lease was made. Nothing is alleged to have occurred intermediate the sale and lease, but in the interim a redemption notice is to be published. The lease is, by statute, conclusive evidence of the regularity of the sale, but not of the redemption notice. (*Doughty v. Hope*, 3 Denio, 603; 1 Oomst., 79; *Van Alstyne v. Erwine*, 1 Kern., 331.)

IV. The lease might have been duly made, and yet the redemption notice be defective. Supposing the proceedings all regular to the lease. The lease is not to become absolute until a subsequent notice is given, the proof of service of such notice filed, and a certificate of compliance with the statute obtained. (Laws 1841, ch. 230, §§ 3, 4, 6, 7; Laws 1843, ch. 235, § 6, p. 335; Laws 1843, ch. 230, art. III, §§ 20, 21, 24, p. 327; Laws 1853, ch. 579, § 3, p. 1065; *Curtis v. Follett*, 15 Barb., 342.)

The pleadings will be taken to be as strong as the facts will warrant. (*Cruger v. Hudson R. R. Co.*, 2 Kern., 201.)

M. L. Townsend, for the defendant, respondent.

The answer sets up facts, which, being admitted by the demurrer, show a right of possession in defendant, viz.: 1st. A sale duly made in pursuance of the statute, by the Mayor, &c., for a tax duly imposed, to defendant's grantor (prior to plaintiff's seizure); 2d. Due execution and delivery of a lease on such sale, pursuant to the statute, to defendant's grantor (prior to the plaintiff's seizure); 3d. "That

Carter v. Koezley.

defendant had at the time of the action and now has, a leasehold interest in the premises, and a right to possession of the same;" (Under this allegation alone, defendant might prove any facts which would show any leasehold interest, or any right to the possession); 4th. That Ross, (prior to plaintiff's seizin), being in possession and having a leasehold interest for 98 years, leased the same to defendant's assignor for 15 years. This gives defendant a title and a right of possession, prior to plaintiff's seizin.

WHITE, J. In this case, which is an action of ejectment to recover possession of a lot of land in 83d street, in the City of New York, the defendant attempts to interpose a special answer or plea of title in himself, to the possession of the premises, by virtue of a lease for a term of years not yet expired, executed by the Mayor, Aldermen and Commonalty of the City of New York, upon a sale made by them for non-payment of taxes duly imposed on said lot; and which lease and term of years had come to him by assignment, and are now, and were, at the commencement of the action, owned by him. The main allegation in the answer states, that the premises "were duly sold in pursuance of the "statute in such case made and provided by the Mayor, "Aldermen and Commonalty of the City of New York, to "one Arthur Ross, for the term of twenty years, for the "non-payment of a certain tax duly imposed thereon, in "pursuance of the statute in such case made and pro- "vided; and that the said Mayor, Aldermen and Common- "alty did, thereupon, in pursuance of the statute in such "case made and provided, and on or about 27th April, "1855, duly execute, acknowledge and deliver to said "Arthur Ross, in due form of law, a lease of said lots, Nos. "14 and 15, for the term of twenty years, then next ensu- "ing." Then follows an allegation of the assignment of the lease to the defendant, and that by virtue thereof he possessed a leasehold interest in and to, and a right to the possession of, the lot described in the lease, which is the same land mentioned in the complaint, &c.

Carter v. Koezley.

A further attempted defense is set up, stating, in substantially the same terms, a second sale and lease, by the Mayor, Aldermen and Commonalty, of the same premises, and a possession by the defendant, of a leasehold interest thereunder.

The plaintiff demurs to all that part of the answer, which sets up these pretended defenses, on the ground that they constitute neither a counterclaim nor a defense.

We think that the above allegations, contained in the answer, show no valid title to the possession of the premises. It is not affirmatively, and in direct terms, stated in them, that a tax had been imposed upon the land in question by the proper authorities, and in the proper manner, setting all forth specifically; nor is it stated that the proof of non-payment of the tax, (which is a preliminary required by the statute,) had been made to the officer designated in that behalf by the statute; all of which allegations are necessary to show a right in the Mayor, Aldermen and Commonalty to sell the land and give a lease of it; and there being, therefore, no right to sell or to lease shown to exist in the Mayor, Aldermen and Commonalty, in this particular case, the lease affords no protection or justification to the defendant.

The order made at Special Term must, therefore, be reversed, the costs of the appeal to abide the event of the suit; and the defendant, upon payment of the costs of the demurrer at the Special Term, to have leave to serve an amended answer in ten days after service upon his attorney, of the order to be entered upon this decision.

BOSWORTH, Ch. J. Neither of the defenses demurred to states when, by whom, for what cause, or under what statute, the alleged tax was "imposed" on the premises in question; neither does it state the amount of the tax imposed, nor expressly aver that any part of it was unpaid at the time of the alleged sale of the said premises.

That such a plea was bad on general demurrer, prior to the Code, is settled by the cases of *Frary v. Dakin*, (7

Carter v. Keesley.

Johns., 75,) *Morgan v. Dyer*, (10 *Id.*, 161,) *Wyman v. Mitchell*, (1 *Cow.* 316,) *Dakin v. Hudson*, (6 *Id.*, 220,) *Bowman v. Russ*, (*Id.*, 234,) *Sheldon v. Hopkins*, (7 *Wend.*, 435,) and *City of Buffalo v. Holloway*, (7 *N. Y. R.*, 493.)

It is as essential to the sufficiency of an answer under the Code, stating new matter as a defense, as to that of a special plea, prior to the Code, that it state facts which, if true, will bar the action, or so much of it as is attempted to be answered.

The Code has not introduced any new definition of the word *fact*, nor any new test of the sufficiency of new matter which will constitute a defense.

Section 161 of the Code does not aid the answers in question. They do not allege, nor purport to allege, a judgment or other determination of a designated Court, or officer of special jurisdiction. If the imposition of a tax upon real property under any statute of this State, for any cause, can, by any liberal interpretation of language, be regarded as a determination of an officer or officers of special jurisdiction within the meaning of this section, the answer does not attempt to state by whom the tax was imposed.

The parts of the answer demurred to are, in brief, that the defendant has a right to the possession of the premises in question, as assignee of a lease, of a specified date, for a term of years, executed by the Mayor, &c., in pursuance of a sale, by them duly made on a day named, of the premises in question, for the non-payment of a tax duly imposed thereon.

Such an answer is insufficient; it states none of the facts relied upon to show that a tax was duly imposed on the property, for the non-payment of which, the Mayor, &c., of New York might lawfully sell it; nor, if one had been imposed, does it aver the further facts essential to create authority in that body to advertise and sell.

The order appealed from must be reversed, and judgment ordered for the plaintiff; but with liberty to the defendant to amend his answer, on payment of the costs of

Gilman v. Oliver.

Brush v. Kohn.

the demurrers, prior to the appeal; the plaintiff's costs of the appeal to abide the event.

JULIUS S. GILMAN, Plaintiff and Respondent, v. ISAAC J. OLIVER, Defendant and Appellant.

It was decided in this case, that the fees of a stenographer, whose employment is directed by the Court, under section 256, of the Code of Procedure, cannot be taxed as a disbursement in the cause.

Heard, at Special Term, before Mr. Justice MONELL.

Heard, in General Term, before BOSWORTH, Ch. J., and MONCRIEF, BARBOUR and MONELL, J. J., March 8, 1862; decided March 29, 1862.

SEE the point decided, in the index to this volume, under the title, "Practice—costs." See the appeal reported at length, with the opinion of the Court at General Term, in 14 Abbots' Pr., 174.

SYLVESTER BRUSH, Plaintiff and Respondent, v. HEZEKIAH KOHN, Defendant and Appellant.

1. A general verdict in favor of one party, rendered by the Jury, in obedience to the instructions of the Judge, cannot be corrected on motion, so as to transform it into a verdict for the other party.
2. Wherever the Court, on a supposed state of facts, instructs the Jury, if they so find the facts, to render a verdict for the plaintiff, when the instruction should have been to find, in that event, a verdict for the defendant, the remedy, if no exception is taken, is to move, on a case, for a new trial.
3. This rule applies where the defendant tendered and paid into Court the amount due, and the Judge directed, and the Jury accordingly found a verdict for the plaintiff for that sum, instead of a verdict for defendant.

(Before BOSWORTH, Ch. J., and MONCRIEF, ROBERTSON, WHITE, MONELL and BARBOUR, J. J.)

Heard, March 22, 1862; decided, March 29, 1862.

APPEAL from an order denying a motion to correct the verdict.

The facts appear in the opinion of the Court. The motion at Special Term was made before Mr. Justice MONELL, and his decision, which was now appealed from, is reported in 14 Abbotts' Pr., 51.

Isaiah T. Williams, for defendant, appellant.

I. The amendment would not prejudice the plaintiff.

II. The amendment was refused on the ground that, because of the error of the Judge, the verdict could not be corrected.

III. This was not an application to review the trial. The error of the Judge may not have led the Jury to find formally for the plaintiff.

IV. The mistake, if it arose from the error of the Judge, is one which it is due to justice to correct instantly, when pointed out.

V. In *The Bank of Columbia v. Southerland*, (3 Cow., 336,) it was because there was a verdict subject to the opinion of the Court, that a case was held necessary.

VI. The Judge did not expressly direct a verdict for the plaintiff, but a verdict for the sum paid into Court. The form of the verdict was not as directed by the Judge, but only the substance.

VII. Payment into Court, under a plea of tender before suit, was required by the practice in such cases, to perfect the answer of tender. (2 Hill, 538; 14 Wend., 221; 8 Barb., 408.)

VIII. Payment into Court is no acknowledgment of the right of action, beyond the amount paid in. (1 Tidd's Pr., [2d Am. ed.,] 568; 1 Term R., 629, 464; 3 Id., 657; 4 Id., 10, 579.)

IX. There was no dispute as to the fact of tender and payment.

X. On plea of tender before suit brought, and payment into Court, unless the plaintiff prove a sum beyond what is paid in, there should be a verdict for the defendant. (3 Cow., 336; 1 Burr. Pr., 408; 1 Wend., 191.)

XI. After trial the verdict may be amended so as to conform to the facts, where there is no doubt as to such

Brush v. Kohn.

facts, either from the certificate of the Judge or otherwise, and of the real intentions of the Jury. (*Burham v. Tibbits*, 7 How. Pr., 21; 3 Sumn., 410; Code, § 173; 8 Cow., 623; Hob., 54; 12 Wend., 135; 15 Johns., 318; 7 Cow., 29; 10 Mass. R., 64; 7 How. Pr., 21; 2 Burr., 698; 3 Term R., 659; 9 Cow., 151; 2 Johns. Cas., 17; 11 Pick., 125; 1 Dal., 134; 14 Johns., 86; *Rockefeller v. Donnelly*, 8 Cow., 652, 656; *Sayre v. Jewett*, 12 Wend., 135.)

XII. Before or after judgment, the Court, in furtherance of justice, may amend any proceeding by correcting a mistake in any respect. (Code, § 173.)

XIII. The whole matter of amendments is in the discretion of the Court. (3 Sumn., 410.)

XIV. It is not in furtherance of justice to permit the plaintiff to recover costs of the defendant, where the matter litigated (viz., whether any rent was due after Jan. 1, 1860) was found in defendant's favor.

XV. So much of the plaintiff's claim as related to rent up to the 1st of January, 1860, by the tender and payment into Court, was out of the case; all the residue of the litigation was in reality disposed of in favor of the defendant.

XVI. The remedy for a misfinding of the Jury is by motion. (1 Clinton's Digest, 136, § 267.)

XVII. If it appear, from the opinion of the Special Term, that the motion was denied for want of power to grant it, an appeal lies, though it be a matter resting in discretion. (12 Abbotts' Pr., 16, 28; 20 N. Y. R., 81.)

J. M. Van Cott, for plaintiff, respondent.

I. Errors occurring at the trial can be reviewed and corrected only upon a case. (*Bellows v. Shannon*, 2 Hill, 86; *Smith v. Smith*, 4 Wend., 468; *Schermerhorn v. Schermerhorn*, 5 Wend., 513; *Belden v. Davies*, 2 Hall, 443; *Bank of Columbia v. Southerland*, 3 Cow., 336; Code of Proced., §§ 264, 265; *Alston v. Jones*, 17 Barb., 276; *Storey v. Brennan*, 15 N. Y. R., 524.)

II. The instruction to the Jury to find a verdict for the

Brush v. Kohn.

plaintiff was right. There was no valid tender. The sum tendered was not enough. Plaintiff has recovered less rather than more than he is entitled to.

BY THE COURT—BOSWORTH, Ch. J. This is an appeal by the defendant from an order denying a motion to change the verdict, which is a general verdict in favor of the plaintiff, for \$166.67, into a verdict for the defendant.

The action was brought to recover \$500, for the rent of premises leased by the plaintiff to the defendant. The defendant, before suit brought, tendered the sum of \$166.67; plead the tender as a defense, and, accompanying his plea, paid into Court the sum tendered.

The plaintiff insisted that the lease continued for a longer period than the defendant conceded it did. The defendant proved that he made the tender as pleaded. The Judge, at the trial, instructed the Jury, "that if they found that no more than the sum so tendered and paid into Court was due or owing for the said rent, that then their verdict would be for the said plaintiff for the said sum so tendered and paid into Court, to wit, \$166.67."

I state the instruction, in the words in which the moving affidavit alleges it was made. The Jury rendered a verdict for the plaintiff for that sum.

The plaintiff, on an affidavit stating these facts, and that the Jury did find that no more was due or owing for rent than the sum so tendered, moved, at Special Term, for an order changing their verdict for the plaintiff into a verdict for the defendant; that motion was denied, and from the order denying it this appeal is taken.

It is not pretended, whatever it may be alleged the Jury found, that the verdict, in form and words, is other than a general verdict in favor of the plaintiff, for \$166.67.

Whatever error may have occurred at the trial, none can be imputed to the action of the Jury. They obeyed the instructions of the Judge, and if there was any error, it was his, and not the Jury's. The Jury having rendered a general verdict for the plaintiff, and no different direction

Brush v. Kohn.

having been given by the Court, it was the duty of the Clerk to enter judgment in conformity with the verdict. (Code, § 264.)

There is no mode presented by the Code by which the defendant can be relieved from the error committed at the trial, except a motion at Special Term, upon a case, for a new trial. (Code, § 265; Rule 34 [15].)

Such was the practice before the Code. (*The Bank of Columbia v. Southerland*, 3 Cow., 336.)

It cannot justly be said, that the Jury rendered a verdict different in form from what they intended; they obeyed the instructions of the Court.

And this case is, in principle, precisely like every other, where the Court, on a supposed state of facts, instructs the Jury, if they find the facts to be as thus supposed, to render a verdict for the plaintiff, when the instruction should have been, to find, in that event, a verdict for the defendant.

That the error is more apparent in one case than in another, makes no difference in respect to the remedy to be pursued by the injured party. In all such instances, where no exception is taken, the remedy is a motion, on a case, for a new trial.

If the Jury had found specially, that the defendant tendered the whole sum due, judgment could be given in his favor notwithstanding a general verdict in favor of the plaintiff for the sum tendered. (Code, § 262, [217].)

Where a general verdict has been rendered for a plaintiff, upon a declaration containing several counts, some of which are bad, and the Judge certifies that all the evidence given at the trial is applicable to the good counts, he may be permitted to amend the verdict, as it is sometimes expressed, by applying it to the good counts. (1 Cai., 386; 12 Wend., 135.) This, in effect, is to permit the plaintiff to enter up his judgment on the good counts. (*Stafford v. Green*, 1 Johns., 505; *Jones v. Kennedy*, 11 Pick., 125.)

Brush v. Kohn.

The verdict remains in favor of the party who recovered it, and for the sum rendered, and, by leave of the Court, the record is so made up as to show that it was rendered on the good counts only.

So, although a verdict may not conclude formally in the words of the issue, yet if the point in issue can be concluded out of the finding, the Court will work it into form, and make it serve according to the justice of the case. (*Porter v. Rummery*, 10 Mass. R., 69.) In other words, the Court will disregard the verbal imperfections and uphold the judgment. (8 Cow., 662, 663; *Thompson v. Button*, 14 J. R., 84.)

Even an alteration of its verbal phraseology, so as to make it express by words precisely that which the Court deems to be its legal effect, is quite a different thing from transforming a general verdict in favor of a plaintiff into a general verdict in favor of the defendant.

No authority or precedent in support of the power of the Court to order the latter has been cited, and we are satisfied that no such power exists, on such a state of facts as this case presents. (*U. S. Trust Co. v. Harris*, 2 Bosw., 86; *Bemus v. Beekman*, 3 Wend., 667.) According to the papers before us, the Jury have not committed any error, nor made, inadvertently, a mistake; the error or mistake, if there be any, is that of the Court, and can only be redressed by a motion, on a case, for a new trial.

The order should be affirmed, with costs, but without prejudice to the right of the defendant to move, at Special Term, for leave to make a case and move thereon for a new trial.

The Butchers' and Drovers' Bank v. Jacobson *et al.* Case v. Banta.

THE BUTCHERS' AND DROVERS' BANK OF PROVIDENCE,
Plaintiffs and Respondents, v. FREDERICK JACOBSON *et*
***al.*, Defendants and Appellants.**

It was decided in this case, that in pleading an instrument for the payment of money only, under section 162 of the Code of Procedure, by giving a copy and stating the amount claimed to be due, it is not necessary to allege that the defendants made it, nor to show how they are connected with it.

Heard, at Special Term, (on motion for judgment for frivolousness of demurrer,) before Mr. Justice MONCRIEF, January 28, 1862.

Heard, in General Term, before BOSWORTH, Ch. J., BARBOUR and MONELL, J. J., April 14, 1862; decided, April 26, 1862.

SEE the point decided, in the index to this volume, under the title Pleadings.

See the appeal reported at length, with the opinion of the Court at General Term, in 15 Abbotts' Pr., 218.

CHESTER N. and LAWRENCE CASE, Plaintiffs and Appel-
lants, v. WILLIAM BANTA, Defendant and Respondent.

1. Under section 388 of the Code of Procedure, which enlarges the remedy for obtaining discovery and inspection of books and papers pending suit, if a party establishes, to the satisfaction of the Court or Justice, that any book, paper or document is in the possession or under the control of the adverse party, containing competent evidence relating to the merits of the action or defense, its production for inspection may be compelled.
2. Thus, where, in an action for breach of warranty on a sale of goods, the plaintiffs, made affidavit that there was a written contract which they had not known, or had forgotten at the commencement of the action, and that it was in the possession of defendant, who refused to exhibit it or give a copy, and that it was material to them in the action; *Held*, that they were entitled to an order requiring defendant to give them an inspection and copy, or permission to take a copy.

(Before BOSWORTH, Ch. J., MONCRIEF, ROBERTSON, BARBOUR and MONELL, J. J.)

Heard, April 19, 1862; decided, April 26, 1862.

Case v. Banta.

APPEAL from an order made at Special Term, denying a motion for an order that the defendant permit the plaintiff to take a copy of a contract or agreement made between the parties in this action, and referred to in the affidavits read on the motion.

The action was to recover damages for the breach of a warranty made by the defendant to the plaintiffs, on the sale of about fifty-four dozen hats. The hats were purchased by sample, and it was alleged that the bulk did not correspond with the sample shown, the defendant having promised that they should. The plaintiff stated in his affidavit, "that he has recently been informed and believes that there was a *written contract or memorandum of agreement* for the sale and delivery of the said hats," which was not known to him at the commencement of the action, or which he had forgotten. It further appeared that the agreement was in possession of the defendant, who had refused to exhibit it to the plaintiffs, or give them a copy, and was material for the plaintiffs in the action.

L. B. Woodruff, for plaintiffs, appellants.

I. The agreement is the sole original of an instrument upon which the rights of both the parties depend, and was made for the very purpose of securing the rights of each. The casual fact that the defendant is (in the confidence which was reposed in him) the custodian of the instrument, does not affect the plaintiffs' right. So far from impairing their title to see and use the instrument, this circumstance makes the conduct of the defendant in withholding the instrument, more unjust and inequitable, and calls more strongly for the interference of the Court.

2d. The principles of the Court of Chancery regulating discovery made this distinction:—where books, papers or documents in the possession of an adverse party were the sole property of such party, discovery could only be had by bill of discovery, or by a cross-bill filed for that purpose, and in that case all the conditions requisite to sustain

Case v. Banta.

such a bill must be shown ; but where both parties have an equal right to the examination of the papers or documents, the Court, on mere motion, and on an application in any stage of the suit, would order the adverse party to deposit the same with an officer of the Court, and permit copies to be taken. (*Kelly v. Eckford*, 5 Paige, 548, and cases there cited.)

3d. In a Court of law it is a matter of course to compel one party who has the possession of a document which belongs equally to both, to produce the same for the inspection of his adversary of the purpose of the suit. (*Same Case*; *Goater v. Nunneley*, 2 Strange, 1130; *Reid v. Coleman*, 2 C. & M., 456; 4 Tyr., 272; *Blakey v. Porter*, 1 Taunt., 386; *Cooke v. Tanswell*, 1 Moore, 465; *Gigner v. Bayly*, 5 J. B. Moore, 71; *Bateman v. Phillips*, 4 Taunt., 157; *Travis v. Collins*, 2 C. & J., 625; *Morrow v. Saunders*, 1 Brod. & Bing., 318; 3 J. B. Moore, 671; *Wallis v. Murray*, 4 Cow., 399, and cases cited; *Ruberry v. Binns*, 5 Bosw., 685; *Brevoort v. Warner*, 8 How. Pr., 321, 326.)

II. If the foregoing be not entirely conclusive of the right of the plaintiffs to the inspection they seek, then they are entitled to that inspection upon other grounds regulating discovery, even of papers which belong to the defendant himself. "Enough must be stated to justify a presumption that the documents exist, are in the possession or control of the party, and that they will tend to establish some claim or defense of the party asking the discovery, and that they are not in his possession or control. (*Hoyt v. Am. Exch. Bank*, 1 Duer, 655; *Exchange Bank v. Monteath*, 4 How. Pr., 280.)

The Court has power to compel a defendant to discover documents relating to the merits, which are necessary to the plaintiff to enable him to prepare for trial. (*Gould v. McCarty*, 1 Kern., 575.) *Powers v. Elmendorf*, (2 Code R., 421,) goes much further even than is sought in this case.

The moving papers should be such as to enable the Court to see that the documents relate to the merits, and

Cum v. Barta.

that they will be presumptively material in preparing for trial, and if that appear, the oath of the party to that effect is not even necessary. (*Hoyt v. Am. Exch. Bank*, 1 Duer, 656.)

It is no answer to say that the party can be compelled to produce the paper on the trial by *subpoena duces tecum*. That furnishes no aid in preparing for trial, and besides, the plaintiffs are entitled to secure an inspection of the document or a copy thereof, without the necessity of calling their adversary. Where a party is seeking to make a prying examination into the books and papers of his adversary for the purpose of gathering evidence, there is propriety in holding, that, as he can examine his adversary on the trial, that will furnish him all the aid necessary; and it is just, because the adversary can himself supply all proper explanations. But when the object is simply to obtain an inspection or copy of a specific agreement, executed by both parties, no explanation is necessary. It in no degree partakes of the character of a fishing examination, and it should be allowed to the applicant, in order to aid him in the preparation of his cause.

S. F. Cowdrey, for defendant, respondent.

I. The contract, of which discovery is sought, if there is any, can only apply to the defense in the suit. The plaintiffs sue for damages for breach of warranty on sale of hats, and not on the alleged contract. The complaint ignores the existence of any written contract. The defendant alone can avail himself of it.

II. Neither the Revised Statutes nor the Code enable either party to a suit to compel his opponent to discover papers or books, unless such papers as will aid the "party applying for the discovery." The words in each are, "relating to the *merits of the suit or the defense therein*." The uniform and unvarying decisions, under the Revised Statutes, are that the discovery must be intended to aid the party applying. The Code has made no alteration in this respect; it has only made a verbal alteration of the

consequences of a refusal to comply with the order of the Court. (Compare provisions of 2 R. S. and Code.)

The case of *Powers v. Elmendorf*, (4 How. Pr., 60,) admits the principle applicable by the law before the Code, but decides the Code has established a different rule, because of the concluding sentence of the Code. The same reasoning will apply to the Revised Statutes. Per WOODRUFF, in *McAllister v. Pond*, (15 How. Pr., 299,) the discovery must be material to applicant's case.

III. Assuming that the plaintiffs can require the production of the alleged contract, the affidavits do not make out a case entitling them to discovery.

BY THE COURT—MONELL, J. Without examining the questions discussed on the argument of this appeal, as to the power of the Court, independently of the Code, to grant the relief asked for by the plaintiffs, we are so well satisfied (in which the Justice who made the order appealed from now fully concurs) that the plaintiffs have brought themselves within the provisions of section 388, of the Code, that we entertain no doubt the order appealed from should be reversed. That section authorizes the Court before which the action is pending, or a Justice thereof, in their discretion, on due notice, to order a party to give to the other an inspection and copy, or permission to take a copy of any books, papers or documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein.

If it is established to the satisfaction of the Court or Justice, that any book, paper or document is in the possession or under the control of the adverse party, containing evidence relating to the merits of the action or defense, it seems to me free from doubt, if it is otherwise competent evidence, that its production for inspection by the opposite party, may be compelled. The power conferred by the Code is in addition, and auxiliary to the provisions of the Revised Statutes, (*Gould v. McCarty*, 1 Kern., 575,) and was intended, I think, both to simplify the proceedings and enlarge the remedy.

McCreery *et al.* v. Willet.

The agreement, the production of which was sought by this motion, may be the very foundation of the action, and the plaintiffs having proceeded upon the supposition that the contract was by parol, ought not, in justice, to be met at the trial by an objection, fatal, perhaps, to their suit. Besides, the agreement was the agreement of both parties, and, upon well established principles, it belongs as much to the one party as the other.

The order appealed from should be reversed; ten dollars costs of the plaintiffs' on the motion at Special Term, to abide the event of suit.

An order is to be entered requiring the defendant or his attorney, to give to the plaintiffs or to their attorney, within ten days from the entry of the order and service of a copy thereof, an inspection and copy, or permission to take a copy of the agreement or memoranda of agreement, for the sale and delivery of the hats mentioned in the complaint in this action. The order to be settled on two days notice to the defendant's attorney.

JAMES MCCREERY *et al.*, Plaintiffs and Respondents, v.
JAMES C. WILLET, Sheriff of the City and County of
New York, Defendant and Appellant.

It was decided in this case that, in a suit against the Sheriff in the nature of debt, for escape, insolvency of the debtor is not matter of defense or mitigation of damages.

Heard, at Special Term, before BOSWORTH, Ch. J., January, 1860; see the decision reported, 4 Bosw., 643.

Heard, in General Term, before BOSWORTH, Ch. J., BARBOUR and MONELL, J. J., April 14, 1862; decided, May 10, 1862.

SEE the point decided, in the index to this volume, under the title Escape.

See the appeal reported at length, with the opinion of the Court at General Term, in 23 How. Pr., 129.

EUGENE GUILHON *et al.*, Plaintiffs and Respondents, v. GABRIEL and SANTIAGO LINDO, Defendants and Appellants.

1. The Code of Procedure does not authorize the issue of an attachment, as a provisional remedy in an action of an equitable nature, where the amount which the plaintiffs may recover must be ascertained by an accounting, and the costs are in the discretion of the Court.
2. Thus, where in action for an injunction against the infringement of a trade mark, and for damages, an attachment was issued; *Held*, that it was improvidently granted, and must be set aside. Such an action is not "an action for the recovery of money" within the meaning of section 227 of the Code.

(Before all the Justices.)

Heard, April 26, 1862; decided, May 10, 1862.

IN this action, an attachment was issued against the defendant, Santiago Lindo, upon the ground that he had absconded or concealed himself to avoid the service of a summons; a motion being made to set aside such attachment, the motion was denied and an appeal is taken from such order.

It was conceded that the facts stated in the affidavit, upon which the attachment was granted, established the grounds upon which it was issued. The nature of the action sufficiently appears from the opinions.

John Cook, for defendants, appellants.

I. To lay the foundation of an attachment under the Code, the claim must arise out of some contract or obligation arising between the parties, and without that fact appearing from the plaintiffs' affidavits, no claim can be made under section 227, as that section inevitably means that the claim must be a substantial one, arising out of some transaction had between the parties, and not upon any fictitious, visionary or imagined or supposed damages arising out of an alleged tort, which is the case in this complaint. (6 Abbotts' Pr., 357.)

- II. All the authorities referred to at pages 362, 364-367, 369-371, and also the sections of the Code, under the head of Attachments, referred to, speak of the defendant as a debtor, or of an actual debt existing in fact between the parties at the time the officer grants the attachment.

The complaint in this action does not claim, or pretend to claim that the plaintiffs are creditors of the defendants, nor is it pretended in the complaint or on the affidavits on which the attachment was issued, that the defendants, or either of them, are in any way or manner indebted to the plaintiffs; on the contrary, the complaint and affidavits of the plaintiffs show clearly that there is no actual claim on the part of the plaintiffs against these defendants.

H. D. Sedgwick, for plaintiffs, respondents.

I. The affidavits on which the attachment was founded, exactly complied with section 229 of the Code, and contained all the three applicable requisites prescribed by that section, properly established as matters of fact.

(a.) It appeared by the affidavits, that a cause of action exists against the defendant.

(b.) They specified the amount of the claim, and the grounds thereof.

(c.) They showed that the defendant had departed from this State with intent to avoid the service of a summons. (Code, §§ 227, 229; *Gould v. Bryan*, 3 Bosw., 626; see Iowa Code, 1851, §§ 1846, 1849, 1851; Laws Tenn., 1843, ch. 29; *Thompson v. Carper*, 11 Humph., [Tenn.] 542, 545.)

II. It is wholly immaterial, under the Code, what is the nature of the cause of action existing in favor of the plaintiffs against the defendant.

The order appealed from should be affirmed with costs. (*Floyd v. Blake*, 19 How. Pr., 542; 11 Abbotts' Pr., 349; *Ward v. Begg*, 18 Barb., 139, 142; *Hernstien v. Matthewson*, 5 How. Pr., 196; see § 135 of Code [of 1849, and present Code, subs 2 and 3,] and compare with §§ 227, 229, of Code; 2 R. S., 3, [5th ed. 3 R. S., 79,] §§ 1-4.)

Gulihon *et al.* v. Lindo. (No. 1.)

MONCRIEF, J. An attachment may issue "in an action for the recovery of money." (Code, § 227.) The affidavit on which the warrant may be issued must state enough to make it appear "that a cause of action exists against such defendant, specifying the amount of the claim, and the grounds thereof, and such facts and circumstances as will establish that the defendant is concealed," &c., &c. (§ 229.)

Assuming that this action is for the recovery of money, it being an action claiming a perpetual injunction restraining the defendants from using their trade mark, &c., (2 Sandf., 599, 619,) there is no averment in the affidavits or in the complaint, that upon an accounting by the defendants of the goods sold by them, if it be determined that the plaintiffs' title is established, any indebtedness will appear, or the means by which the Judge could ascertain such amount; nor is there any allegation of damage sustained by the plaintiffs by reason of the acts of the defendants; the damage, if any, will be the profits, if any, of which they have been deprived by means of the defendants' fraud. In consequence of the difficulty of making out a decree of taking an account of profit, such an account is rarely taken. (3 Myl. & Cr., 428.)

The action, however, is not for the recovery of money; it is true that the plaintiffs have asked that the defendants make an account of their sales, but this is the usual form of prayer in the bill formerly filed in the Court of Chancery, and addressed solely to its equitable power; the decree providing for a reference to a Master, &c. (2 Sandf. Ch., 611, 619.)

The warrant of attachment requires the Sheriff "to attach and safely keep all the property of such defendant within his county, or so much thereof as may be sufficient to satisfy the plaintiffs' demand, together with his costs and expenses, the amount of which must be stated in conformity with the complaint."

In the present action, costs are in the discretion of the Court; (*Coats v. Holbrook*, 2 Sandf. Ch., 598; Code, § 306;)

Guilhon *et al.* v. Lindo. (No. 1.)

and this action is an equity action and triable by the Court without a Jury.

The present action not being an action for the recovery of money, and the affidavits not showing that a cause of action exists (therefor) against the defendants, "*specifying the amount of the claim*" and the grounds thereof, the attachment was improvidently granted, and it should be set aside. The order denying the motion to vacate and set aside the attachment was therefore erroneous, and must be reversed, but without costs of this appeal; ten dollars costs of motion to discharge the attachment to the defendant, Santiago Lindo, to abide the event of the action.

BOSWORTH, Ch. J. Is this "an action for the recovery of money," within the meaning of § 227 of the Code?

The various provisions of the chapter in relation to attachments, show that an action at law, to recover money as its main object, was contemplated. The judgment is to be satisfied out of the property attached, by selling real and personal property on execution. (Code of Pro., § 237.) Enough must be attached to satisfy the "*plaintiff's demand*." (Id., § 231.) The affidavit for an attachment must specify "*the amount of the claim and the grounds thereof*." (Id., § 229.) In an action for the recovery of money, if a plaintiff recovers \$50 or more, he recovers costs, as a matter of right, (Id., § 304, sub. 4;) if he fails to do this, he must pay costs.

This action is an equity suit, is triable by the Court, (Id. §§ 253, 254,) and the costs are in the discretion of the Court. (Id., § 306; *Buchanan et al. v. Morrell et al.*, 13 How. Pr., 296, decided under the Code as amended in 1851.) I think the attachment was improvidently issued.

Order reversed, without costs of appeal to either party, with \$10 costs of motion to defendant to abide event.

**EUGENE GUILHON *et al.*, Plaintiffs and Respondents, v.
SANTIAGO LINDO, (who was impleaded with another,)
Defendant and Appellant.**

1. In an action brought to enjoin the defendants from infringing plaintiffs' trade mark, an answer alleging that the defendants had sold only a very small and specified quantity of merchandise bearing the label complained of, and that the same was sold to the plaintiffs' agent at their request, and that the use of the label was accidental, without intent to defraud plaintiffs or imitate their label, and did not represent the article to be the plaintiffs', is not frivolous.
2. In action of this nature the judgment cannot direct the damages to be assessed by a Sheriff's Jury. The proofs must be taken by the Court or a Referee.
3. Where, in such a case, judgment is ordered for frivolousness of defendant's pleadings, the judgment should either be in the form proper where nothing is left to be ascertained but the amount of damages, or it should simply adjudge the pleading frivolous and leave the plaintiff to apply to the Court for the relief he seeks.

Before all the Justices.)

Submitted, April 28, 1862; decided, May 10, 1862.

THIS action, as is stated in the foregoing report of another appeal therein, was brought to restrain the infringement of a trade mark adopted by the plaintiffs in the sale of wine.

The complaint charged that the defendant, Santiago Lindo, fraudulently put up and offered for sale, and now offers for sale under the name and trade marks of the plaintiffs', an article in imitation of the St. Julien Claret Wine of the plaintiffs', with intent to deceive and defraud the public, and the buyers and consumers thereof, &c., under the belief that it is the genuine wine or liquor of the plaintiffs', to their great injury, and that their profits have been greatly diminished, if not destroyed. The demand for relief was for an injunction, and 5,000 dollars damages.

To the above charges, Santiago Lindo answered, that at the commencement of the action he had sold only two boxes of wine, containing 24 bottles, and that to the plaintiffs' agents, Valerio & Fassin, at their request, and that

Guilhon et al. v. Linda. (No. 2.)

the use of the said label was purely incidental and accidental, and caused by a third party, without any intent or knowledge of defendant to injure or defraud the plaintiffs, or to imitate or counterfeit their said label, and did not represent said wine or said label to be the plaintiffs'. The answer also denied that the plaintiffs have sustained the damages alleged under their said complaint, or any damage whatever, and alleges that since the commencement of this action, defendant has wholly discontinued the use of the said label.

The answer further stated that defendant did not know that any such persons as plaintiffs exist, and that the plaintiffs' agent named in the complaint had not any legal power or authority to commence this present action.

The plaintiffs moved for judgment on the answer as frivolous; and the motion was heard at Special Term, before Mr. Justice WHITE, on the 27th of February, 1862, and granted. The order entered, directed plaintiffs' damages to be assessed by a Sheriff's Jury. The defendant appealed from the order to the General Term.

John Cook, for defendant, appellant, insisted that the denials in the answer took material issues, which defendant had a right to raise; and that the allegations as to plaintiffs being fictitious persons, or the suit being brought without authority, were sufficient; or, if not, that the answer was not frivolous, but the remedy was a demurrer, or a motion to strike out; and that the issues should be tried, and not sent before a Sheriff's Jury to assess damages.

H. D. Sedgwick, for plaintiffs, respondents.

I. The questions as to the existence of the plaintiff, and the authority for bringing this suit, are not properly pleaded, do not relate to the cause of action, and raise no issue, in form or in fact.

II. The answer admits the plaintiffs' cause of action against him. (Code, §§ 2, 218, 219, 220; *Williams v. John-*

Gulihon et al. v. Lindo. (No. 2.)

son, 2 Bosw., 1; *Amoskeag Man. Co. v. Spear*, 2 Sandf. Ch., 603, 611; *Coats v. Holbrook*, Id., 586; *Taylor v. Carpenter*, 11 Paige, 293; *Partridge v. Menck*, 2 Barb. Ch., 101; *Clark v. Clark*, 25 Barb., 76; *Gillott v. Kettle*, 3 Duer, 624; *Lemoine v. Gauton*, 2 E. D. Smith, 343; *Dale v. Smithson*, 12 Abbotts' Pr., 237; *Blafeld v. Payne*, 4 Barn. & Adol., 410; 24 E. C. L. R., 87; *Davis v. Kendall*, 2 E. I. R., 566.)

2. The only defense suggested by the answer is matter going in mitigation of damages. Such matter does not enter into the cause of action, is not traversable, and (except by statute in the case of actions of slander, [Code, § 165,]) never raises an issue in the cause. It should be tried by a Sheriff's Jury, which is the proper tribunal for the computation and assessment of damages.

The order for judgment on account of the frivolousness of the answer, and directing the plaintiffs' damages to be so assessed, was, therefore, right, and should be affirmed with costs. (Code, §§ 168, 149, 247; *Bates v. Loomis*, 5 Wend., 134; *Gilbert v. Rounds*, 14 How. Pr., 47; *Lane v. Gilbert*, 9 Id., 150; *Saltus v. Kipp*, 5 Duer, 646; *Rosenthal v. Brush*, 1 Code R., [N. S.,] 228; *Connors v. Meir*, 2 E. D. Smith, 314; *Hackett v. Richards*, 3 E. D. Smith, 13.)

II. That a portion of the relief claimed is equitable does not affect the question. No distinction exists under the Code as to the procedure in reference to an insufficient answer, whether the cause of action is legal or equitable. No exception is made. (Code, Preamble, and § 247.)

And the rule was similar in equity. (Story's Eq. Pleadings, §§ 852, 649.)

The disposition of the issue, as to each defendant is, or may be, separate, although there can be but one final decree in the cause, which will be settled and entered after the issues are severally disposed of.

BY THE COURT — BOSWORTH, Ch. J. Is the answer frivolous?

It avers that, up to the time this suit was brought, only two boxes of wine (of 24 bottles each) had been sold, and that these were sold to the plaintiffs' agent, at their

The Bank of Mutual Redemption v. Sturgis *et al*

request; that the use of the label was accidental, "without any intent or knowledge of this defendant to injure or defraud the plaintiffs, or to imitate or counterfeit their said label, and did not represent the wine or the label to be that of the plaintiffs."

This denies all fraudulent intent, and, if true, is substantially an answer to the claim for damages. These allegations, if true, are material on the question of costs.

That part of the order which directs the damages to be assessed by a Jury is clearly wrong. (Code, § 246, sub. 2.) The proofs must be taken by the Court, or a reference be ordered. (*Id.*) It is not an action to recover money only, or specific real or personal property with damages for withholding it, nor is the examination of a long account involved. It is only in these actions that damages can be assessed by a Sheriff's Jury. (*Id.*)

The Court should either have pronounced the proper judgment, leaving nothing to be ascertained but the amount of the damages; or else it should have simply adjudged the answer frivolous, and then left the plaintiff to apply for the relief demanded by the complaint, as prescribed by section 269 of the Code. (12 How. Pr., 342.)

Order reversed.

THE BANK OF MUTUAL REDEMPTION, Plaintiffs and Appellants, v. WILLIAM STURGIS, JR., *et al*, Defendants and Respondents.

1. Where, in case of assets in controversy among creditors, a Receiver has been appointed in a suit brought by a part of the creditors, other creditors, prosecuting another suit, which seeks to appropriate and apply the assets, to the exclusion of the rights claimed by the former, cannot have a second Receiver appointed, unless the first Receiver, or the creditors he represents, are made parties to the latter action, and have opportunity to be heard on the question.
2. Thus, where the plaintiffs held bills drawn by R., upon, and accepted by S. & Co., his factors, who had a lien upon the general residue of goods in

The Bank of Mutual Redemption v. Sturgis et al.

their hands for such acceptances and other advances, and, in actions on the bills against R., the plaintiffs issued attachments against his property, and levied on the goods in the hands of S. & Co., who certified to the Sheriff that they had no property of R.; and the plaintiffs, after obtaining judgments, and their executions being returned unsatisfied, brought a creditor's suit for the benefit of themselves and all other creditors similarly situated, seeking to reach the goods and have them applied to pay their judgments: *Held*, that as it appeared that other creditors, holding such bills, with an equal right to have the assets applied to their payment, had already had a Receiver appointed in an action on their own behalf, the Court should not appoint a second Receiver, at the instance of the present plaintiffs.

3. Even if S. & Co., should be deemed to have lost their lien as factors, by certifying that they had no goods of R., this cannot affect the right of other creditors, who, before the certificate was given, had acquired an equitable right to have the assets applied to pay acceptances held by them.

(Before all the Justices.)

Heard, April 26, 1862; decided, May 24, 1862.

THE plaintiffs, a corporation of the State of Massachusetts, brought this action, on behalf of themselves and certain other creditors of Robert Rennie, against William Sturgis, Jr., William Shaw, Henry Shaw and Latimer Bailey, composing the firm of Sturgis, Shaw & Co., and said Rennie. The plaintiffs had recovered four judgments against Rennie, in the Supreme Court of this State.

The actions in which the plaintiffs recovered such judgments, were instituted to recover the amount of certain bills of exchange drawn by Rennie, and accepted by his co-defendants (Sturgis, Shaw & Co.) Such acceptances were given pursuant to a course of dealing between them, by which course of dealing Rennie, who was a manufacturer, sent his products to Sturgis, Shaw & Co., who were commission merchants, to be sold, and the latter advanced their acceptances and cash, not on specific consignments, but on the general residue of merchandise in their hands sometimes exceeding their value. Having made large advances, by these acceptances, and otherwise, they claimed the goods in their hands, as well as a mortgage which Rennie had assigned to them, as security therefor.

The plaintiffs were originally holders of some such acceptances of Sturgis, Shaw & Co., which they exchanged for

The Bank of Mutual Redemption v. Sturgis et al.

other similar ones at longer periods, on which they brought the four actions, and recovered their judgments, before mentioned, against Rennie. At the commencement of those actions, the plaintiffs issued attachments against the property of Rennie, and notices thereof were served upon the defendants, Sturgis, Shaw & Co., who gave certificates to the Sheriff, stating that they had no property of Rennie's in their possession, although they had in their possession a large amount of goods consigned to them by him. After the judgments were recovered, executions were issued thereon, and returned unsatisfied. Both Rennie and Sturgis, Shaw & Co. have become insolvent.

The plaintiffs then brought the present action, alleging in their complaint that Sturgis, Shaw & Co., fraudulently certified they had none of Rennie's property, although the only interest they had in such goods, &c., in their possession was to apply the same to the payment of the plaintiffs' claim on their acceptances, and to those held by other similar creditors. The complaint also stated, that the plaintiffs brought the action "on behalf of themselves, and of all other creditors of said Rennie, whose debts against the said Rennie, or the defendants in this cause, are entitled to satisfaction out of the said goods, and who may come in and contribute to the expenses of this action."

Sturgis, Shaw & Co. denied all fraud, and stated that the certificate was given under advice of counsel, and that Rennie was indebted to them for a considerable amount over and above all the acceptances, for which amount, as well as to secure payment of the acceptances, they had a lien. They further stated, that they desired the proceeds, subject to such balance for cash, as may be due to Sturgis, Shaw & Co., to be applied equally towards the payment of all of said outstanding acceptances, including those held by the plaintiffs, and that the plaintiffs should not have a preference over the other holders of said acceptances, and they were advised and believed that the plaintiffs had no such preference.

The Bank of Mutual Redemption v. Sturgis & al.

It was also shown, on the part of the defendants, that after the attachments, or some of them, had been served, and on or before the 20th day of February, 1862, in a certain action in this Court, wherein Gustavus A. Scheidt and another were plaintiffs, and William Sturgis, Jr., and others were defendants, Ogden Haggerty was appointed Receiver of the goods, mortgage, &c., mentioned in the complaint in this action.

On this state of facts, the plaintiffs claimed that, as judgment and attaching creditors, they were entitled to have the obstruction interposed by the claim of Sturgis, Shaw & Co., to hold the assets as security for advances by them, removed, and to be enabled to sell the same by an execution on the judgments, or to have the goods applied to the payment of their debts, and that of others standing in like attitude to them.

The plaintiffs moved for an injunction and Receiver, before Mr. Justice ROBERTSON, who denied the motion conditionally, he holding, that plaintiffs might have enforced their equity in favor of all holding similar acceptances; but that they had no separate right, and as those who had no judgment or attachment could not come into this action without sustaining plaintiffs' claim, they must elect either to strike out their claim to preference over other creditors holding acceptances, or to strike out all that professed to make the action for their benefit. The order entered accordingly declared, that the plaintiffs' motion for an injunction and Receiver was denied, with seven dollars costs to the defendants, "*unless the plaintiffs, in ten days after the entry of this order, pay such costs, and elect to amend the complaint, by striking therefrom all averments now contained therein respecting the issuing of attachments and the proceedings thereon, against the defendants, or either of them, and also all averments now contained therein respecting the recovery of judgments and the proceedings thereon against the defendants, or either of them; and also amend the said complaint by inserting therein an averment that this action is brought on the behalf, and for the*

The Bank of Mutual Redemption v. Sturgis et al.

equal benefit of themselves and all other holders of acceptances of Sturgis, Shaw & Co., given or accepted in like manner with those held by the plaintiffs ;" and, if they made such amendment, the motion was granted, with the usual provisions as to appointing the same person as Receiver who had been already appointed. And it was further provided, that if the plaintiffs should not amend as above required, they might, at their option, in ten days after the entry of the order, amend the complaint by making the same an action in form for their own benefit exclusively as attachment, judgment and execution creditors of the defendant, Robert Rennie, in respect to the property mentioned in the complaint; and that, upon so amending, the motion for an injunction and Receiver as against Sturgis, Shaw & Co., be denied, but that as against Rennie it be granted.

The plaintiffs appealed to the Court at General Term.

William Curtis Noyes, for plaintiffs, appellants, on the questions of Sturgis, Shaw & Co.'s lien, and the waiver of it by their certificate, and plaintiffs' right to levy, cited *Russell on Factors*, 38, 191-213; *Bell v. Palmer*, (6 Cow., 128,) *Marfield v. Goodhue*, (3 Comst., 62,) *Warner v. Martin*, (11 How., [U. S.,] 209;) *Cross on Lien*, 45; *Boardman v. Sill*, (1 Camp. N. P., 410,) *Jacobs v. Latour*, (5 Bing., 130,) *Thompson v. Trail*, (6 B. & C., 36.) And to the point, that equity would compel the factors to resort first to the mortgage for their own claim, leaving the fund produced by the goods to be applied to the acceptances, he cited *Farmers' Loan & Trust Co. v. Walworth*, (1 Comst., 433.)

Augustus F. Smith, for defendants, respondents.

I. The holder of a consignor's draft on the factor has no equity enabling him to sue for a Receiver of the consigned property, upon the mere insolvency of the parties to the draft. (*Marine Bank v. Jauncey*, 3 Sandf., 257.) There is no such equity even in case of partnership debts. (*Robb v. Stevens*, Clarke, 191; *Kirby v. Schoon-*

The Bank of Mutual Redemption v. Sturgis *et al*

maker, 3 Barb. Ch., 46; *Ketchum v. Durkee*, 1 Barb. Ch. B., 481.)

II. Plaintiffs have not acquired any preference over other holders of drafts. Their attachments and executions bind nothing more than if they had sued on any other indebtedness.

III. It being conceded that they have no preference at law, this action being an attempt to gain a preference in equity, the maxim that "equality is equity" is an answer. (Story's Eq. Jur., §§ 557, 554; *De La Vergne v. Evertson*, 1 Paige, 181.)

IV. The plaintiffs having sued for others as well as themselves, cannot claim a preference over such others. (Code § 119; *Smith v. Lockwood*, 1 Code R., N. S., 319; *McKenzie v. Lamoureux*, 11 Barb., 516; *Habicht v. Pemberton*, 4 Sandf., 657; see also *LaChaise v. Lord*, 1 Abbotts' Pr., 213; *S. C.*, 10 How. Pr., 462.)

V. The giving of the certificate does not amount to a waiver or forfeiture of the lien. (Story's Agency, § 367; Dunlap's Paley's Agency, 217; *Nash v. Mosher*, 19 Wend., 431; Russell on Factors, 216; *Scarfe v. Morgan*, 4 M. & W., 270.)

J. M. Van Cott, for appellants, in reply, urged that the factors here were disentitled to use their lien, founded upon liabilities for Rennie, in hostility to their creditors' legal process to enforce that identical lien. The relief sought by plaintiffs, in the application of the goods to pay the drafts, would exonerate the factors from the very liability which was the ground of their alleged lien.

BY THE COURT—BOSWORTH, Ch. J. 1st. Sturgis, Shaw & Co. have a right to apply the consigned goods to pay their acceptances, unless they have lost that right by reason of the certificate they gave to the Sheriff, when the latter levied the attachments. (Russ. on Factors, 211; 5 B. & Ald., 27; Parsons' Merc. Law, 161.)

2d. If they have not thus divested themselves of that

Betta v. Bache.

right, the plaintiffs had no right to take and remove the consigned goods, without paying the amount of Sturgis, Shaw & Co.'s lien thereon. (*Brownell v. Carnley*, 3 Duer, 9.)

3d. The equitable right of Scheidt & Co., and others similarly situated, to have the proceeds of the consigned goods applied to pay the acceptances they hold, (if they ever had such a right,) became perfect before Sturgis, Shaw & Co. gave to the Sheriff the certificate which it is claimed put an end to their lien. It is not easy to see how the giving of that certificate can affect rights which had previously accrued to third persons, who had no agency or participation in that act.

4th. The plaintiffs are not entitled, in this action, without other parties are brought before the Court, to a receivership in hostility to, or that can interfere with that already existing. The Receiver who has been appointed and has possession of the property, and the parties he represents, are not, nor is either of them a party to this action.

The Receiver or those parties should be made parties to this action, and be heard upon the question, before a Receiver can properly be appointed in aid of a suit which seeks to appropriate and apply the property, to the exclusion of the rights claimed by the parties represented by the Receiver of the property already appointed.

The order must be affirmed; with \$10 costs to abide the event.

FREDERICK F. BETTA, Plaintiff and Respondent, v. JOHN H. BACHE, Defendant and Appellant.

It was decided in this case, that a complaint for money lost at play, stating that on a day named, defendant received a specified sum of money belonging to or on account of the plaintiff, and which is now due him, claiming judgment therefor, is sufficient on demurrer.

Heard, at Special Term, before ROBERTSON, J., in May, 1862.

Heard in General Term, before BOSWORTH, Ch. J., MONCRIEF, ROBERTSON, BARBOUR and MONELL, J. J., May 31, 1862; decided, June 7, 1862.

Tracy v. The New York and Harlem Railroad Company.

SEE the point decided, in the index to this volume, under the title, Pleadings.

See the decisions at Special Term, and on the appeal, reported at length, in 14 Abbotts' Pr., 279.

WILLIAM TRACY, Plaintiff, v. THE NEW YORK AND HARLEM RAILROAD COMPANY, Defendants.

Where defendants had appealed to the General Term from an order of the Special Term, denying a new trial, under a stipulation that the appeal be heard there without judgment or security; and after the order was affirmed upon the appeal, judgment was entered, and the defendants' appealed from the decision of the General Term to the Court of Appeals; — *Held*, that they were not entitled to have the judgment amended, by adding that exceptions had been heard and overruled by the General Term. If defendants feared the Court of Appeals would not regard the exceptions, they should take an appeal from the judgment, and the exceptions would necessarily form part of the judgment record.

At Special Term, before ROBERTSON, J., January, 1863.

MOTION to correct or amend the recitals of the judgment which had been entered in this case, in favor of plaintiff, after a new trial had been denied, and the order denying it affirmed by the Court, at General Term, on appeal. The decision of that appeal is reported, *ante*, p. 396.

The facts relative to the present motion will sufficiently appear in the opinion.

ROBERTSON, J. This action was brought to recover personal property, claimed to be wrongfully detained. The plaintiff recovered possession of it after the delivery of a requisition to the Sheriff to take it. The plaintiff obtained a verdict. The Jury assessed the value of the property at one thousand dollars, and also twenty-five dollars as damages for the detention. A motion was made for a new trial at Special Term, which was denied, and the order denying it was affirmed, on appeal to the General Term.

Tracy v. The New York and Harlem Railroad Company.

After the decision at Special Term, the parties stipulated that "the case on appeal to the General Term be taken "and decided" at such term, "without judgment or security." No judgment was ever entered until after the decision at General Term; the judgment then entered on the verdict recites the making and denial of the motion for a new trial, and the affirmance of such denial on appeal, and adjudges that the plaintiff recover the possession of the property claimed, and the sum assessed for damages and costs, as adjusted.

The defendants now move to amend the judgment roll, by adding to the judgment that "exceptions had been fully argued before the General Term of the Court, and denied and overruled, and judgment ordered for the plaintiff thereon, and that the decision" of the Special Term "should be affirmed."

No judgment was, or could have been given at General Term, except on the order denying a new trial, which, when the case contains exceptions, includes their examination. The Code, (§ 265,) provides that a motion for a new trial on a case or exceptions, must first be heard and decided at Special Term, except in certain specified cases, of which this is not one. Another provision, (§ 281,) requires exceptions and other papers to form part of the judgment roll. On an appeal from the judgment, the defendants have a right to have the exceptions considered. (*Jellinghaus v. The New York Insurance Co.*, 5 Bosw., 681.) And although it would have been an answer to the motion for a new trial, if judgment had been perfected before the motion was heard; (Ib.) yet, after the motion has been made and denied on the merits, and the appeal from the order denying it, also heard, no objection of judgment having been entered could be taken in the appellate Court; and the record would show it was entered after the hearing of the motion. The appellate Court will hear the appeal from the judgment, at General Term, affirming the order denying a new trial on the same papers on which such new trial was moved, which include the exceptions.

Judgment for the plaintiff on exceptions, at General Term, could only be ordered where they had been directed to be first heard there, which was not the case here.

If there is any ground for apprehension that the appellate Court will not hear the case, on exceptions, the defendants can also appeal from the judgment, and the exceptions, as filed, will also necessarily form part of the judgment record. But I do not see any necessity or propriety in inserting in a judgment at Special Term, on the verdict, that exceptions have been heard at a General Term, and overruled.

As an appeal from the affirmance of the order denying a new trial has been taken, it is not necessary to pass on the question whether an appeal from the judgment is sufficient to carry up such order to the appellate Court, or not. (See *Marquart v. La Farge*, 5 Duer, 559; *Brown v. Richardson*, 1 Bosw., 402.) Possibly an order merely granting a new trial might not be sufficient, without some separate motion to open the judgment, but that is not material at present. The appeal from the order denying the new trial could have been heard with an appeal from the judgment. (*Clarke v. Ward*, 4 Duer, 206.) If there is any separate effect to be produced by an appeal from the judgment, in addition to that by the appeal from the affirmance of the order denying a new trial, this Court cannot, by any entry, make one appeal perform both offices.

The title of the summons being incorrect, must of course be changed. The residue of the motion is denied.

GRANDISON F. READ *et al.*, Plaintiffs and Respondents,
v. JOHN R. WORTHINGTON *et al.*, Defendants and Appellants.

1. An assignment of property in trust for the benefit of creditors, which contained the usual recital, that the assignors were "unable to pay their

Read et al. v. Worthington et al.

debts," and were desirous of "dividing their property equitably among their *creditors,"* directed the assignees to pay to persons named in a schedule annexed, "the sums of money which *are or may become due to them*" from the assignors, * * * and afterward, "to pay all the rest, residue and remainder of the creditors of said firm what may *become due to them.*"

Held, 1st. That the assignment was not fraudulent and void on the ground that under its provisions a preferred creditor could purchase other demands than those he held at the time of the assignment, and thus secure a preference for them also; for the provision giving a preference to the specified creditors, for sums which "may become due to them," should be construed to apply to actual debts already owing to them, or contingent liabilities already incurred by them, at the time of the assignment, and thereafter to become payable.

2d. Nor was the assignment void, as excluding from the benefit of the second clause creditors whose debts had become payable at the time of making the assignment. The direction to pay the rest of the creditors such sums as "may become due them," cannot be construed to exclude the payment of claims already due.

2. In construing an assignment of property in trust, for the benefit of creditors, as well as other written instruments, the general intention of the parties is to govern; and if its language can be satisfied by a construction that will support the instrument, a construction should not be given that will defeat it; and fraud is not to be presumed, but must be proved by the party alleging it.
3. An assignment for benefit of creditors is not void for securing and giving a preference to the payment of debts not yet due. Securing such a debt does not hinder or delay creditors, for the assignees may retain in their hands sufficient to meet it, and distribute the residue without delay.
4. An allegation in the complaint that an assignment, which the plaintiffs seek to set aside, was made with intent to hinder, delay and defraud creditors, &c., is sufficiently put in issue by a denial that the assignment was made with intent to hinder and defraud creditors.
5. Under the act of 1860, (Laws of 1860, 594,) an assignment for benefit of creditors is not void because of defects in the inventory filed and the bond given by the assignee.

(Before BOSWORTH, CH. J., and MONCRIEF, ROBERTSON, WHITE and BARBOUR, J. J.)

Heard, June 7, 1862; decided, June 28, 1862.

THIS action was a judgment creditors' suit, brought by various judgment and attachment creditors of the firm of O. W. & T. J. Moore & Co., to set aside an assignment by them to the defendants, Worthington and Knapp. The plaintiffs were, Grandison F. Read, James Benkard and

Read et al. v. Worthington et al.

Benjamin H. Hutton; James H. Black and Alexander Guild; William W. Stone, George B. Bowman and Robert Bliss; Charles H. Wilmerding, John C. Wilmerding, Thomas A. Wilmerding, George G. Wilmerding and William S. Mount; James Haslehurst, Bryan H. Smith and Joseph Haslehurst; and the defendants were, John R. Worthington, George H. Knapp, James Myers, Chauncey W. Moore, John T. Moore, William M. Robbins, Emmor K. Haight, Joseph B. Lockwood, Joseph N. Ely, Chauncey W. Brown and William R. Dean. The present appeal was taken from an order made at Special Term, appointing a Receiver of the assigned property, and enjoining the defendants from interfering therewith; the motion on which such order was made was founded on the complaint duly verified, the affidavits of B. L. Johnson and the plaintiff, Read, and in opposition thereto were read the affidavits of the defendants and upwards of sixty of their creditors, and a certified copy of an instrument of confirmation.

In addition to the usual averments of the recovery of the judgments and issuing of executions and attachments, and their return, the complaint alleges the possession and concealment by the defendants of divers evidences of debt, choses in action, effects, and documents and account books in relation thereto, which they refused to deliver to the Sheriff of the City and County of New York, who held such executions and warrants of attachment, and an application by such Sheriff to the assignees in question, in order to levy on the assigned property. It further alleges, that the Sheriff, at the time of such application, left with such assignees a certified copy of such warrant, and a notice, wherein he stated that he attached the property in their hands, demanded a delivery to him of the evidences of debt, choses in action and effects held by them, together with a certificate designating the amount and description of property held by such assignees for the benefit of the debtors, and the debts owing them, and claimed such assignment to be fraudulent and void; but

Read *et al.* v. Worthington *et al.*

such assignees refused to deliver up the articles demanded, and falsely certified that they had no property belonging to the debtors. It also alleges, that the seven defendants, C. W. and J. T. Moore, Robbins, Haight, Lockwood, Brown and Dean, composing the firm of C. W. & J. T. Moore & Co., who are the judgment debtors, in 1861, on the 4th of December, executed and delivered to the defendants, Worthington and Knapp, and acknowledged before a proper officer, a certain instrument which is set forth *verbatim* therein. This instrument, to which the defendants, members of the firm of C. W. & J. T. Moore & Co., were parties of the first part, and the defendants, Worthington and Knapp, parties of the second part, is under seal, and dated the 1st of December, 1861. It recites, that the parties of the first part had become "insolvent and *unable to pay their debts*, and were desirous of dividing "their property equitably *among their creditors*," and for the expressed consideration of one dollar and other good considerations, assigns all the property of the parties of the first part, and each of them, of every kind, to the parties of the second part, to hold upon certain trusts, which were, (first,) to collect and convert into money such assigned property; (secondly,) therewith to pay the legal expenses of drawing such assignment and executing such trusts; then, (thirdly,) to pay to persons named in an annexed schedule "the sums of money which *are, or may become*, due them from the assignors, not exceeding, "however, the sums set opposite the names, respectively, "of those who had any so set, if so much should *become due them*" from the assignors, or *pro rata*, in case such proceeds are insufficient to pay the whole; and lastly, (fourthly,) to pay all the rest of the creditors of the firm what might *become due* to them. In such schedule six persons, of whom the defendant, Knapp, is one, have no sums set opposite to their names. The assignment itself was recorded in Kings County, on the 5th day of December, and a verified inventory of the assigned property was presented to the County Judge of that County, by whom,

on the same day, an order was made, requiring the assignees to give security in the sum of \$230,000, with sureties justifying in double that sum. On the 20th of that month, a bond in the penal sum of \$230,000 was presented to such Judge, signed by the assignees and by four sureties, Hoyt, Sprague, Worthington and Robbins, but purporting, in the body thereof, to be executed by a Mr. Richards; it recited the order and assignment, and was conditioned, as required by law, for the due performance, by the assignees, of their duties. Hoyt justified in the sum of \$160,000, Sprague in the sum of \$60,000, and Messrs. Worthington and Robbins in the sum of \$40,000 each, making \$400,000. Such bond was duly acknowledged, approved and filed. The foregoing facts are set out in the complaint.

The complaint specifies as defects in such inventory its fraudulent omission of property, particularly land on Wabash avenue, Chicago, and an interest of John T. Moore in a firm of Hanford & Browning; also, its want of particularity in describing what was mentioned; its undervaluation; its omission of the names and places of residence of creditors and sums due to them, of the nature of the debt and demand in each case, of the true cause and consideration of such indebtedness, the place where it arose and the collateral securities given therefor; and that the debts of the two creditors, the plaintiff Read and a Mr. Todd, are not properly set out therein. It does not, however, specify what names were omitted, or what the debts were, the particulars of which such inventory fails to give. The complaint also alleges the sureties in the bond not to be sufficient security for the performance of the duties of the assignees by them, and their justification to have been insufficient, as not amounting to the sum required by the order. It also claims the bond executed by them to have been void by the omission of its execution by Mr. Richards, and its filing, without the authority of the other obligors, or any waiver by them of its execution by Richards. It further alleges that five of the persons against whose name no sum was set in the schedule annexed to the

Read et al. v. Worthington et al.

assignment were not creditors of the assignors or either of them when it was executed ; also, that the assignees were not proper or safe persons to execute the trusts ; that all the assigned property is in the City of New York, except certain real estate, and that the debts due by the assignors were contracted in that city ; that the defendant Knapp is a brother-in-law of J. T. Moore, and Worthington a brother-in-law of O. W. Moore ; that the latter resides in Otsego county, having no place of business in this county, and leaves the management of the assignment to the defendant Knapp and the assignors ; that Knapp at the time of the assignment was a clerk of the assignors, and under their influence, is of no responsibility ; that the assignment was made with the intent to retain control of the property, and the bond made defective, so as to involve no liability.

The complaint also alleges, "that the assignment was "so drawn, that the persons named as preferred creditors "might buy up notes and debts of the assignors at a great "discount, and have the same preferred in said assignment "for the full amount thereof, for the benefit of the "assignors." That the judgment debtors in September last, made a pretended sale of their goods and chattels to the defendant Myers, who pretended to take possession thereof, and thereby prevented the Sheriff from levying thereon. That such sale and all the other acts of the defendants were made with intent to hinder, delay and defraud the plaintiffs and other creditors of Moore & Co., of their just rights ; that Myers and the assignees, with the debtors, are about to dispose of such property.

The whole of the complaint is stated to be upon information and belief, and is verified by several of the plaintiffs with the usual qualification in the oath as to matters so stated. The affidavit of Mr. Johnson is positive, however, as to the assignment, bond, inventory, certificates, affidavit and approval annexed, and also that five of the persons named in the schedule annexed to the assignment without sums set opposite to their names, including

Read et al. v. Worthington et al.

the defendant Knapp, are not named as creditors in such inventory.

The affidavits of sixty creditors of the judgment debtors, holding claims to nearly 400,000 dollars, show the ability, responsibility and character of the assignees, and their confidence therein. On the 10th of March, 1862, the five sureties in the bond filed with the inventory in Kings County, executed an instrument under seal, reciting the execution of such bond by them, and their knowledge that Richards was not to be a party thereto, and that they assented to the delivery of such bond as their joint and several bond, whereby they ratified and confirmed such bond. An affidavit of C. W. Moore, one of the defendants, shows that the sureties in such bond were informed before its delivery and acknowledgment by them, that Mr. Richards had declined to execute it, and that they delivered it with such knowledge, and assented to his omission. The defendant, Knapp, swears that he is surety for the assignors, on an appeal in a suit pending in the Court of Appeals. The defendants, who are members of the firm of C. W. & J. T. Moore & Co., state that the Sheriff of the City and County of New York never made the application to them set forth in the complaint. They allege that all their property not exempt from execution were included in such inventory; that it contains the name and residence of each creditor, and the sums owing them, with the nature of each demand and debt, the true consideration of such indebtedness, with the place where it arose, and a statement of all collateral securities for their payment, and that Todd was not a creditor for a larger sum than was stated in such schedule; that the plaintiff, Read, was not mentioned because he was assignee of a demand, and the name of the assignor was inserted; that the five persons whose names have no sum set opposite to them in the schedule annexed to the assignment, were only contingently creditors, having signed certain undertakings for the assignors, and were only mentioned as creditors to protect them against liability, which is corroborated by

Read *et al.* v. Worthington *et al.*

the affidavit of the several creditors themselves. The assignors deny under oath any fraud in the assignment, and allege a *bona fide* sale of their stock in trade in September, 1861, to the defendant Myers, for the best price they could obtain, without any intent to hinder their creditors or reserve anything for their own use. An affidavit of the defendant, J. T. Moore, explains the omission of his interest in the firm of Hanford & Browning by a statement of his sale of the same, *bona fide*, before such assignment. It also contradicts or explains a statement by Mr. Johnson, in regard to the omitting to state the valuation of certain notes of the defendant, Myers, in the schedule, by saying that they were subject to liens, which amounted to more than they were worth.

C. A. Nichols and L. B. Woodruff, for defendants, appellants.

I. This action cannot be maintained, and of course an injunction and receivership cannot be properly granted, except the assignment be declared void.

II. Final approval, by the Judge, of the assignee's bond was an adjudication which cannot be disturbed except upon application to him.

III. Any defects in the bond or schedules, or any matter arising subsequent to the making of the assignment, cannot affect the validity of the assignment, even if the assignors retained property and withheld it from the assignees, as alleged.

IV. There is no evidence of any intent to allow preferred creditors to buy claims for the benefit of assignors.

V. The assignment is not fraudulent because there is a preference made therein in favor of contingent liabilities. (*Cunningham v. Freeborn*, 11 Wend., 241; *Paige v. Wilson*, 8 Bosw., 294; *Kettletas v. Wilson*, 23 How. Pr., 69; *Hendricks v. Robinson*, 2 Johns. Oh., 284.)

It makes no difference whether, in terms, the contingent creditor, or the contingent liability is preferred. Equity will decree the execution of the trust by applying the trust

Read et al. v. Worthington et al.

fund to payment of the liability sought to be secured by it. (*Wright v. Morley*, 11 Vesey, 22; *Keyes v. Brush*, 2 Paige, 311; *Pratt v. Adams*, 7 Paige, 627.)

C. Bainbridge Smith, for plaintiffs, respondents.

I. Plaintiffs' warrants of attachment were issued against the property of the defendants, (C. W. & J. T. Moore & Co.,) and were in the hands of the Sheriff to be executed, before the making and delivery of their assignment; and it being conceded that they had property in their possession at the time the Sheriff had the warrants, which he demanded, and they refused to deliver, and fraudulently concealed, and secreted the same, with the intent that said Sheriff could not find the same, the Sheriff, by such assignment, was not deprived of his lien.

II. A creditor who has obtained a warrant of attachment against the property of a debtor, which the Sheriff is prevented by fraud or otherwise from levying, acquires thereby a lien, as valid and effectual as in the case of an execution at law, and a Court of equity will enforce it in the same manner for the benefit of creditors. (*Falconer v. Freeman*, 4 Sandf. Oh., 565; *Wilson v. Forsyth*, 24 Barb., 109; *Scott v. McMillen*, 1 Littell, 302; *McElwain v. Willis*, 9 Wend., 548; *Drake on Attachments*, 2d ed., 225; *Thayer v. Willet*, 5 Bosw., 357; *Beck v. Burdett*, 1 Paige, 305; *Clarkson v. DePeyester*, 3 Id., 320; *Cuyler v. Moreland*, 6 Id., 276; *Boardman v. Halliday*, 10 Id., 223; *Forbes v. Logan*, 4 Bosw., 482; *Spear v. Wardell*, 1 Comst., 144; *Jacot v. Boyle*, 18 How., 106; *Morton v. Weil*, 33 Barb., 30; *Reed v. Stryker*, 12 Abb. Pr., 47; Code, § 117.)

III. The assignment by the defendants C. W. & J. T. Moore & Co. is fraudulent and void. (*Jessup v. Hulse*, 21 N. Y. R., 168; *Dunham v. Waterman*, 17 N. Y. R., 19; *Nicholson v. Leavitt*, 2 Seld., 517; *Wilson v. Forsyth*, 24 Barb., 105; *Rathbun v. Platner*, 18 Id., 272; *Burdick v. Post*, 12 Id., 168; *Seymour v. Wilson*, 14 N. Y. R., 567; *Dubose v. Dubose*, 7 Ala., 237; *Gamez v. Lazarus*, 1 Dev. Eq., 205; *Goodrich v. Downs*, 6 Hill, 438; *Barney*

Read et al. v. Worthington et al.

v. *Griffin*, 2 Comst., 365 ; *Doremus v. Lewis*, 8 Barb., 124 ; *Dana v. Lull*, 17 Verm., 390 ; *Green v. Trieber*, 3 Md., 11 ; *Malcolm v. Hodges*, 8 Id., 425 ; *Dickson v. Rawson*, 5 Ohio N. S., 218 ; *Spring v. Strauss*, 3 Bosw., 607.)

ROBERTSON, J. The prominent objections against the assignment in this case is, that by a certain construction of its terms, it contains internal evidence of fraud. It is claimed that the direction in it, to pay certain persons named in a schedule annexed, the sums of money which may be or become due to them from the assignors, will enable such persons to acquire claims belonging to others, and be paid the same in full ; while the direction to pay the rest of the creditors, by confining the payment to such as may become due them, excludes the payment of what was due at the time of making the assignment.

There might be some doubt whether the mere fact of naming certain persons to be preferred, provided they should become creditors, would, of itself, make the assignment fraudulent on its face, because the law does not interfere with preferences, provided the debtor does not abuse the right, so as to gain some advantage for himself. The difficulty would be that some time must be fixed for the acquisition of the claim, or it must be left indefinite ; and in either case it would postpone the settlement of the estate and operate to hinder creditors not preferred.

But in this case there is no necessity for such an inquiry ; the terms of the assignment do not warrant the construction contended for. By the two parts of the direction for distributing the assets of the assignors, all the creditors, by its terms, are to be provided for. There are three general rules of interpretation, which, applied to this case, show that the intent on the face of the instrument was honest to creditors : Firstly, that the general intent of the parties is to govern ; Secondly, that the leaning of all constructions should be in favor of supporting, and not overthrowing, an instrument ; and, Thirdly, that fraud is not to be presumed, (*Kellogg v. Slauson*, 15 Barb., 56 ; *Kellogg v. Barber*, 14

Read *et al.* v. Worthington *et al.*

Barb., 11; *Barnum v. Hempstead*, 7 Paige, 569; *Kuhlman v. Orser*, 5 Duer, 250; *Bank of Silver Creek v. Talcott*, 22 Barb., 561;) and assignments are subject to no different rules. (*Pine v. Rikert*, 21 Barb., 469.) Courts are therefore under no obligation to be astute to destroy them.

The recital in this case is that the assignors desire to distribute their property among their creditors; the last part of the direction is to distribute what remains after paying those intended in the first class, among the rest of the creditors; it could hardly be intended by the words, "may become due," the assignors intended to exclude claims *already due*. One of the meanings of "become" is "be," and it certainly seems to be used in that sense here; it is used twice before, and must once, at least, have been there employed in that sense. By the first direction the assignees are directed to pay to creditors named in the schedule to the assignment, whose debts *are due*, "so much as may become due;" this would involve a contradiction and absurdity if "become" implied anything more than "be." But in the first part, by using both "are," and "may become due," the assignors meant both those past due, and existing liabilities to become due. Lexicographers make "*due*" and "*payable*" convertible terms, (see Worcester's Dict.,) and so they are held to be, legally. (*Allen v. Patterson*, 3 Seld., 476.) It is difficult, in a single word, to express present liabilities, payable hereafter; but "due," and "to become due," have, by long usage, come to mean liabilities past due and hereafter to grow due. Besides this, no time is fixed in the instrument for the purchase of the claims; and in such case it is to be understood as speaking as of its date; and "debts" must mean *debts at its date*, which were to become due afterwards. The assignment, therefore, is not fraudulent and void on this ground.

It is, however, suggested that, even if the preferred creditors were not at liberty to buy up claims to secure such preference, the assignment is void for securing debts not yet due. I have had occasion heretofore to examine this question in other cases, and, after full reflection, can

Read et al. v. Worthington et al.

find nothing to justify overthrowing the settled practice in those cases. There is no law which makes a mortgage to secure a surety, by a principal in failing circumstances, void. Whatever debt can be secured by a conveyance directly to the surety, may be secured by one to an assignee in trust, nor is there any principle which puts a contingent liability beyond the possibility of being protected. Nor can there be any difference between protecting the surety and protecting the creditor; a principal, desirous of protecting a surety, is not bound, for that purpose, to admit his liability for a debt which he believes himself entitled to resist. The ground upon which the objection is put is fallacious; an assignment to protect a contingent liability no more hinders or delays a creditor than one to pay a debt not yet due, even if the assignees were not authorized to pay such debt before its maturity. The preference given is asserted to be priority in time, and that the assigned estate cannot be distributed until the liability is ascertained, because the assignment says it is first to be discharged. But assignees have a right to retain sufficient in their hands to meet such liability, and distribute the residue, and, after the liability is disposed of, distribute what remains. (*Cunningham v. Freeborn*, 11 Wend., 241; *Hendricks v. Robinson*, 2 Johns. Ch. R., 284.) If they refuse to do their duty in this respect, they can easily be compelled to do so by an action.

It has also been assumed that the defendants, although denying the charge in the complaint, that the assignment in question was made with intent to hinder and defraud creditors, do not deny the charge that it was made with intent to delay them, and this is founded upon some supposed distinction between delaying and hindering. I should suppose a person who was hindered was effectually delayed; nor do I see how a man can be delayed without being hindered. To hinder any one in his course is, necessarily, to delay him. Not being able to perceive the distinction, I must hold that none exists. Many such pleonasmms are to be found in old English statutes, where they

Read et al. v. Worthington et al.

are introduced for caution's sake, more than with any precise idea as to what they were intended to effect.

All the objections to the proceedings in reference to the inventory filed, and the bond, are mere matters affecting the assignees, and not the assignment. The statute of 1860, (Sess. L., 1860, 594,) does not provide for the consequences of omitting to comply with its provisions; it does not seem to have been intended to prevent assignments, but rather to protect those interested under them, and, therefore, probably was intended only to lay the foundation for an application to a Court to compel a compliance, under penalty of removal.

But the objections to the inventory are explained, the bond is shown to have been binding, and the justification of the sureties was approved by the County Judge; therefore there does not appear to be any reason for removal of the assignees and substituting a Receiver in their place.

It is not necessary to discuss the questions raised as to the lien of the attachments, as the assignment was valid.

The denial, in the affidavits of the defendants, of the demand by the Sheriff of notes, debts, credits and effects, and of the allegations of the complaint in relation thereto, and the averment that they had no property at the time of making the inventory, other than what was mentioned in it, I consider sufficiently takes issue on the allegation that the defendants had goods, notes and other articles when the warrants were issued, and the Sheriff demanded possession of one or more of the defendants and they refused to deliver them; their fraudulent concealment, with intent that the Sheriff could not find them, if not denied, is immaterial by itself; it might make such goods liable, if not claimed by the assignee, but not those assigned and claimed by them.

The assignment, therefore, not being fraudulent on its face or made so by extrinsic evidence, and there being no good cause shown for removing the assignees, or appointing a Receiver, the order made at Special Term should be reversed.

Read et al. v. Worthington et al.

BOSWORTH, Ch. J. In construing an assignment of property in trust for the benefit of the creditors of the assignor, as well as other written contracts, all legal rules resorted to for the purpose of aiding in their interpretation, "are subordinate to that primary rule which requires that every such instrument shall be construed according to the intention of the parties." (*Platt v. Lett*, 17 N. Y. R., 478, 480; *Kellogg v. Barber*, 14 Barb., 11.)

When the language of an assignment can be satisfied by a construction that will support the instrument, it is well settled that a construction shall not be given that will defeat it. (*Kellogg v. Slauson*, 11 N. Y. R., 302, 305.)

Fraud is not to be presumed, but there must be proof of it; and the *onus* of proving the assignment to be fraudulent, rests on the party assailing it. (*Bank of Silver Creek v. Talcott*, 22 Barb., 561.)

The provision which directs the assignees "to pay to the parties named in Schedule A, hereto annexed, the sums of money, with interest, which *are*, or *may become due* to them from the parties of the first part, not exceeding, however, the sums set opposite the names respectively of those who have a sum set thereto, if so much shall become due to them from the parties of the first part," can be abundantly satisfied without construing it to authorize the parties named in that schedule to purchase demands, and to protect and prefer them, if purchased.

The object of the assignment, as declared by its recitals, is a division of the property of the assignors among their creditors equitably. The persons provided for by Schedule A, are only those; and the provision preferring those named in it, includes only those who were creditors when the assignment was made, and they are preferred only in respect to debts then owing to them, or in respect to liabilities which they had theretofore assumed for the assignors. The words "or may become due," when applied to actual debts then owing to any of those persons, mean debts which shall become payable thereafter; and, when applied to persons then under a contingent liability for the assignor,

Harriott et al. v. Wells et al.

mean, sums of money which shall thereafter become payable to them by reason of such contingent liabilities. (*Kellogg v. Barber*, 14 Barb., 11; *Bank of Silver Creek v. Talcott*, 22 Barb., 550; *Allen v. Patterson*, 3 Seld., 476.) Due, sometimes means payable.

The fact that a person is protected against a contingent liability, which is, on its face, an undertaking for a third person, does not raise a presumption, when all the provisions of the assignment are considered, that the assignees have appropriated any of their property to pay debts, or indemnify against liabilities, which it was not their duty to pay or satisfy. (*Bank of Silver Creek v. Talcott*, 22 Barb., 555-557.)

I do not deem it important to add anything to the observations of my brother ROBERTSON, in respect to the other objections urged against the validity of the assignment.

On the papers before us, the assignment should not be adjudged invalid, and the assignees should not be interfered with, by an injunction or Receiver.

The order appealed from should be reversed.

SAMUEL C. HARRIOTT *et al.*, Plaintiffs and Appellants, v.
JAMES N. WELLS *et al.*, Defendants and Respondents.

1. Upon a complaint being amended in a material particular, the defendant's right to answer the amended complaint, by interposing any defense which he may possess, is absolute and unrestricted.
2. Thus, where, upon a trial of an action brought upon a contract, of which the plaintiffs, in their complaint, alleged performance on their part, they failed to prove full performance, but gave evidence of a waiver of such performance by the defendants, and asked leave to amend their complaint accordingly, which was allowed on condition that the defendants be allowed to amend their answer so as to meet the plaintiffs' amendment, but the terms or nature of the amendment to be made by defendants was not prescribed.

Held, on defendants' motion after judgment, for leave to amend the answer by interposing the statute of limitations, that unless the plaintiffs elected to withdraw their motion to amend, the judgment should be

Harriott et al. v. Wells et al.

vacated, and the defendants allowed to amend by interposing the statute of limitations or any other legal defense, without restriction.

(Before BOSWORTH, Ch. J., and MONCRIEF, ROBERTSON, WHITE and BARBOUR, J. J.)

Heard, June 7, 1862; decided, June 28, 1862.

THIS was an appeal from an order of the Court at Special Term, made on the 20th of December, 1861, upon a motion on the part of the defendants to amend their answer.

The action was brought by Samuel C. Harriott and Bernard Rice, assignees of Solomon Kipp and Abraham Brown, against James N. Wells and Don Alonzo Cushman; and was tried before a Referee.

The facts are fully stated in the opinion of the Court at General Term. The motion was granted conditionally at Special Term, the Judge delivering the following opinion:

HOFFMAN, J. The Referee, after the testimony was closed, and, it is said, during the summing up, was asked to allow the complaint to be amended so as to conform the pleadings to the proof, in regard to the time of starting the line and alleging waiver and consent by the defendants.

The defendants' counsel asked that the answer be considered as amended to meet the averment, all which the Referee granted. These are the statements in the case.

The Referee, in his special report, says that he made no other minute than this: "As to pleadings, plaintiffs' counsel now moves to amend his complaint in reference to variance."

No amendments were drawn until the 19th of October, 1861, when the Referee settled the amendments, which were proposed by the plaintiffs' attorney. He also restricted the defendants to a certain answer which was suggested by the plaintiffs' counsel, as all that the defendants could put in.

In this I think there was an error. He had not authority to prescribe what answer the defendants should put in.

The right to answer amendments under the chancery

Harriott et al. v. Wells et al.

system was absolute. A rule of Chancellor WALWORTH fixed the time for such an answer. If an improper answer was interposed to the amendments, the usual course of getting rid of it could be pursued.

If the variance was immaterial no amendment was necessary. If made under section 170 of the Code no answer was necessary or proper.

But if under section 173, the amendment substantially changed the claim, amendments were necessary and could only be allowed at all by the Court, and then a right to answer must exist.

The plaintiffs proceeded upon a covenant, averring strict performance of everything on the part of their assignors, to be done in order to give the right of action. It appears that there was a non-observance of a precedent condition. The plaintiffs prove, it may be assumed, that this was in consequence of a change in that particular, assented to by the defendant. They now want to allege this in their complaint.

The defendants urge that they were confident of defeating the plaintiffs on the ground, set up in their answers, of the failure to perform material stipulations. They did not feel bound to set up any other defense. But that if their assent to the non-performance is to be an element in the case, then it is unjust to deprive them of any other ground of defense they may possess.

The Code does embarrass me in what would otherwise be a very clear case. If a further case is made by amendments, the right to answer is as unlimited as the original right. The answer is to be dealt with as an original answer. That the proposed answer is a plea of the statute of limitations cannot affect the question. (*Catlin v. Gunter*, 1 Kern. R., 368.)

If the plaintiffs' counsel deems himself safe under section 169, without a motion to amend or an actual amendment, I think, upon the facts in the affidavits, he may have the privilege of withdrawing the amendments. So the case will go up free from everything as to amendments.

Harriott et al. v. Wells et al.

The order will be that the defendant be at liberty to file such answer as advised, unless the plaintiff withdraw his amendment, &c., as above mentioned; the cause, in case an answer is filed, to proceed before the Referee, as to any new matters in issue; the judgment to be opened and set aside.

From this decision, the plaintiffs took the present appeal to the Court at General Term.

Albert Cardozo, for plaintiffs, appellants.

A. W. Bradford, for defendants, respondents.

BY THE COURT—WHITE, J. In this case, which is an action commenced in 1855, to recover money (\$2,100 and interest) upon an old contract, a sealed instrument, dated in 1837, the defendants, by their answer, denied that the plaintiffs' assignors had performed the duties, the performance of which, by the terms of the contract, would have entitled them to the money claimed. The case was referred, and on the trial before the Referee, the plaintiffs failed to prove a full performance upon their part; but certain testimony was given which they contended established a waiver by the defendants of such full performance. When summing up before the Referee, the plaintiffs' counsel moved to amend the complaint by inserting in it an allegation of waiver and consent by the defendants as to the particulars in which full performance had not been proved; and thus to conform the pleadings to the facts proved. The defendants' counsel consented to the proposed amendment, provided the defendants were allowed to amend their answer so as to meet the plaintiffs' amendment. The Referee stated that they should be allowed to do so, and leave to amend was accordingly granted; but nothing further was then said or done as to the form of the amendments or reducing them to writing. The plaintiffs' counsel proceeded with his summing up, the Referee reported in favor of the plaintiffs, for \$2,100 and interest; and a judgment was thereupon entered, from which an appeal was taken by the defendants to the General Term.

Subsequently, when the parties appeared before the Referee, to settle the proposed amendments to the pleadings, the defendants desired to amend by interposing a plea of the statute of limitations to the new parol contract, which the amendment of the complaint presented. The plaintiffs objected to any other amendment of the answer than a simple denial of the allegation of a waiver.

The Referee was inclined to impose this limitation upon the defendants, but he made a special report of what took place before him, upon the plaintiffs' original motion to amend, stating it substantially as it is given above; and he added, that his understanding at the time was, that the defendants' amendment was to be only a denial of the allegation of waiver.

Upon this special report and all the pleadings and proceedings in the cause, the defendants moved at Special Term to amend, by pleading, as they had proposed to do, the statute of limitations.

On this motion, after hearing both parties, the Court at Special Term made an order directing, in substance, that if the plaintiffs, within a time specified, elect to withdraw their motion to amend, the cause shall then stand as if no motion to amend had ever been made; but if the plaintiffs do not withdraw their amendment, then the judgment shall be vacated and the defendants be allowed to amend by interposing, without restriction, any legal defense which they may possess, the statute of limitations or any other, and that the cause be sent back to the Referee for a new or further trial upon both the old and the new issues.

From this order the plaintiffs have appealed.

We think the order was correct. Upon a complaint being amended in a material particular, the defendants' right to answer the amended complaint by interposing any lawful defense which he may possess, is absolute and unrestricted. The order must therefore be affirmed, with ten dollars costs to the defendants.

PETER MORRIS, Plaintiff and Respondent, v. THOMAS J. WALSH, Defendant and Appellant.

It was decided in this case, that the imprisonment of a debtor does not prevent the plaintiffs' remedies for enforcing the judgment;

That it is no excuse for not complying with a judgment directing the execution of a conveyance, that the conveyance prepared for execution was not tendered at the time of serving a copy of the judgment and a demand of compliance; nor that the defendant was imprisoned, and that when the conveyance was tendered for execution there was no witness, or officer to take the acknowledgment, present, and no seal upon the instrument; and,

That proceedings to punish for contempt in not complying with one part of a decree do not preclude subsequent proceedings to put the party in contempt in respect to another part.

Heard, at General Term, before all the Justices, October 11, 1862; decided, October 18, 1862.

SEE the points decided, in the index to this volume, under the titles "Imprisoned Debtor; Practice—Contempt; Practice—Judgment."

And see the motion and appeal reported at length, with the opinion of the Court, in 14 Abbotts' Pr., 387.

DAVID D. ELSTON, Plaintiff and Appellant, v. WILLIAM C. POTTER, Defendant and Respondent.

In an action to recover the possession of specific personal property, an order of arrest which recites that the cause of action is for a detainer or conversion, and requiring the Sheriff to hold the defendant to bail, in a specified sum, is unauthorized. In such an action, the ground of arrest is a concealment, &c., of the property, and the order must require an undertaking to pay the amount which may be recovered.

(Before all the Justices.)

Heard, October 11, 1862; decided, October 18, 1862.

APPEAL from an order, made at Special Term, vacating an order of arrest theretofore granted in the action.

Elston v. Potter.

The action was brought to recover the possession of a railroad bond, which plaintiff claimed to own, and alleged that defendant had converted. The plaintiff obtained, upon affidavit, an order for the arrest of the defendant, which order, omitting the formal parts, was as follows :

"It having been made to appear to me by affidavit, that the above named plaintiff has a sufficient cause of action against said defendant, for wrongfully detaining or converting personal property, and that said defendant has disposed of or concealed said personal property, with intent to deprive the plaintiff of the benefit thereof, and to prevent its being found and taken by said Sheriff. You are required forthwith to arrest William C. Potter, the defendant in this action, for the cause aforesaid, and hold him to bail in the sum of fifteen hundred dollars, and to return this order," &c.

The Justice who granted the order, subsequently, on motion of the defendant, vacated it, and from the order entered upon this decision the plaintiff now appealed.

J. C. Dimmick, for plaintiff, appellant.

A. Prentice, for defendant, respondent.

BY THE COURT — MONCRIEF, J. The authority and direction to the Sheriff "*to hold the defendant to bail*," are contained and to be found only in the order of arrest. (§ 183, Code.) The order of arrest in this action states "that the plaintiff has a *sufficient cause of action* against said defendant for *wrongfully detaining or converting personal property*," &c. Under such an order the Sheriff could demand only such an undertaking as is required under subdivision 1 of section 179 of the Code, "that the defendant shall at all times render himself amenable to the process of the Court," &c. (§ 187.) Such an order of arrest was obtained in the action in the Supreme Court and voluntarily abandoned by the plaintiff. The counsel for the respective parties conceded, and it appears by the papers used upon this appeal, that this is an action "to

Oeters v. Groupe *et al.*

recover the *possession* of personal property, &c., and in such an action the order of arrest is granted upon the ground that the property is concealed, &c., by the defendant so that it cannot be found, and with the intent that it shall not be found and taken by the Sheriff, and requires the Sheriff to take from the defendant an undertaking to pay the amount which may be recovered against the defendant. (Sub. 3, § 179 and § 211, Code.)

The order of arrest was therefore properly discharged, and the order made at Special Term must be affirmed.

**JOHN H. OETERS, Plaintiff, v. JOHN GROUPE *et al.*,
Defendants.**

It was decided in this case, that, if on an appeal the appellant fails to make a case, and fails to appear on the argument, the respondent may take a judgment of affirmance.

Heard, at General Term, before BOSWORTH, CH. J., and MONCHEE, ROBERTSON, WHITE, and MONELL, J. J., October 25, 1862; decided November 8, 1862.

SEE the point decided, in the index to this volume, under the title, "Practice — Appeal."

And see the motion to set aside a judgment of affirmance reported at length, with the opinion of the Court at General Term, in 15 Abbotts' Pr., 263.

**HENRY BUTTER, Plaintiff and Appellant, v. CLAUS PUCK-
HOFER *et al.*, Defendants and Respondents.**

1. In an action in which the Court have jurisdiction of the parties and the subject matter, the omission of an infant plaintiff to procure the appointment of a guardian *ad litem*, is an irregularity which may be cured or waived. It does not deprive the Court of jurisdiction.
2. The defect is cured if the plaintiff attains majority before the defendants raise any objection.

(Before BOSWORTH, CH. J., MONCHEE, ROBERTSON, BARBOUR and MONELL, J. J.)

Heard, November 8, 1862; decided, November 15, 1862.

Butter v. Puckhofer & al.

APPEAL from an order setting aside the summons and complaint and all subsequent proceedings in this action.

The action was to recover damages for the unlawful taking of the personal property of the plaintiff. The defendants were Claus Puckhofer and Charles F. Watts. They jointly answered the complaint, denying generally every allegation, and claiming the property under an execution.

The action was at issue about the 20th September, 1861.

Upon affidavits that the plaintiff, at the commencement of the action, was an infant, and that no guardian had been appointed for him, the defendants moved, in February, 1862, to set aside the proceedings. The defendants' attorney states in his affidavit that the defendants had no knowledge or information that the plaintiff was an infant, until the 3d of February, 1862.

In opposition to the motion, the plaintiff read his affidavit, in which he swears he became of age on the 17th of December, 1861.

It was understood that the motion was granted on the ground that the Court could have no jurisdiction of the action unless a guardian was appointed before the service of any process therein.

Charles Cheney, for plaintiff, (appellant.)

Cited *Hill v. Thaxter*, (3 How., Pr., 407;) Code, § 144, sub. 2; Id., §§ 147, 148, and notes; *Hastings v. McKinley*, (1 E. D. Smith, 273; affirmed Seld. Notes, No. 4, p. 19;) *People v. N. Y. Com. Pleas*, (11 Wend., 164;) *Leopold v. Meyer*, (10 Abbotts' Pr., 40;) *Van Santv. Eq. Pr.*, 29, 88; 1 Hoffm. Ch. Pr., 60.

G. W. Cotterill, for defendants, (respondents.)

Cited *Hill v. Thaxter*, (3 How., Pr., 407,) *Hofstailing v. Teal*, (11 Id., 188,) *Wilder v. Ember*, (12 Wend., 191,) *Constock v. Carr*, (6 Id., 526,) *Ex parte Scott*, (1 Cow., 83,) *Arnold v. Sandford* (14 Johns., 417,) 2 Saund., 212.

Butter v. Puckhofer et al.

BY THE COURT—MONELL, J. It is not disputed that the plaintiff was an infant at the commencement of the action, nor that he did not procure the appointment of a guardian. There is some doubt whether he became of age before the motion was made. Two of the defendants' affidavits give declarations of the plaintiff, showing him not to be of age, but the plaintiff swears he became of age in December, 1861, and he proves it by the family record, usually the best evidence of the fact.

I am inclined to believe the plaintiff's statement, and to assume that he was of age when the motion was made.

It is not necessary to decide whether the provision of the Revised Statutes, requiring the appointment of a next friend for an infant plaintiff, before the issuing of process, is in force, or in any degree affected by the Code. Both require the appointment to be made, the one of a next friend and the other of a guardian, before the commencement of the action. Nor is it important to determine, whether the position of the plaintiff's counsel, that the objection goes to the legal capacity of the plaintiff to sue, and, therefore, is waived by not setting it up by answer, is or is not sound.

I think the learned Judge who granted the motion erred in deciding that this was a jurisdictional question. The Court had jurisdiction of the parties and of the subject of the action, and the omission, therefore, to procure the appointment of a guardian was an irregularity, which might be cured or waived.

We have not been referred to any case where such omission has been held to deprive the Court of jurisdiction; and I believe no such case can be found.

In *Fitch v. Fitch*, (18 Wend., 513,) a *capias* was issued at the suit of an infant plaintiff, before the appointment of a next friend. A motion to set aside the proceedings was denied, it appearing that since the commencement of the suit a next friend had been appointed. The subsequent appointment cured the irregularity.

But in *Fellows v. Niver*, (Id., 563,) the question was

Rutter v. Puckhofer *et al.*

more fully examined. The suit was commenced without a next friend. After plea pleaded the defendants moved to set aside the proceedings. It was shown on the part of the plaintiff, that, since the commencement of the suit, a next friend had been appointed, but notice thereof had not been given to the defendant. The Court, after reviewing the several statutes on the subject, and alluding to the practice requiring the defendant to take advantage of an infant's suing without a *prochein ami*, by plea in abatement, say "the only difference between the former statutes and the present is this; formerly the *prochein ami* was appointed after the issuing of the process, but before a declaration; now it should be done before process; but now, as formerly, it is a question of regularity merely; not, as the defendant's counsel supposed, a question of jurisdiction. It is a question of practice, and the irregularity may be waived under the present statute as well as under the old statutes. In both periods, the next friend must be appointed before declaration, and the appointment must appear in the commencement of the declaration. The practice after declaration is the same now as formerly. If this suit was commenced by writ, the defendant might have moved, before he pleaded, to set aside the writ; but, having pleaded to the merits, he has waived the irregularity, and admitted that the plaintiffs are *recti in curia*. If he has any remedy now, it is not by motion."

This case covers the whole ground, and is decisive against the defendants, unless it can be said that their answer, having been put in without any knowledge or information of the irregularity, cannot be deemed to be a waiver of it. The subsequent steps of a party in an action, in ignorance of an irregularity, do not always operate as a waiver of the irregularity. But there is no proof of such ignorance except the attorney's affidavit.

The answer, however, in this case is, that before the motion was made the plaintiff had attained to his majority, when the necessity for, as well as the offices of a guardian,

Purchase v. Bellows.

had ceased. I entertain no doubt that, after the infant becomes of age, the guardian may be released and the suit may proceed in the name of the infant alone. The infant then becomes *sui juris*; he is responsible for costs, and can appoint his own attorney.

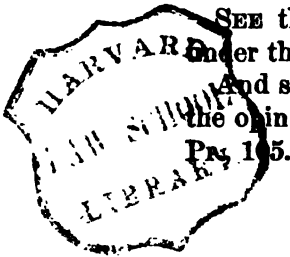
For these reasons we are of opinion the order should be reversed, without costs.

JOHN PURCHASE, Plaintiff and Respondent, v. GEORGE F. BELLOWS, Defendant and Appellant.

In this case it was decided that the Court may deny a motion to set off, against a judgment, the costs of an appeal from an order on a summary application after judgment, in order to protect the attorney's claim to a lien on the costs of such proceeding after judgment, although the case be one where a set-off might be enforced by action.

Heard, in General Term, before BOSWORTH, Ch. J., and BARBOUR and MONELL, J. J., April 25, 1863; decided, May 30, 1863.

SEE the points decided, in the index to this volume, under the titles, "Practice, — Motion, — Set-off." And see the motion and appeal reported at length, with the opinion of the Court, at General Term, in 16 Abbotts' *Pr.* 165.



JOHN R. CURRIE, Plaintiff, v. EDWARD P. COWLES, et al., Defendants.

Where, in case of a breach of trust, the fund remains land, and the plaintiff frames his action to seek specific, equitable relief, joining as defendants with the trustees, third persons who claim an interest in the land, and pending the action the plaintiff files a supplemental complaint, in which he alleges that the land has meanwhile been converted into money, and claims a judgment for damages, as well as all the relief asked in the original complaint, not inconsistent therewith, the action is still triable by the Court without a Jury.

Special Term, June, 1862, before ROBERTSON, J.

Currie v. Cowles et al.

JOHN R. CURRIE was plaintiff in this action, and Edward P. Cowles and wife, and the president, directors and company of the Housatonic Bank, are the defendants. The suit was commenced October 15, 1855.

The cause was tried before a Referee, upon whose report a judgment was entered for the plaintiff; but on appeal it was reversed, and a new trial ordered. That decision is reported 6 Bosw., 452, where the allegations of the complaint and the demand of relief are fully stated. The plaintiff now moved that the cause be set down on the day Calendar for trial by Jury.

L. R. Marsh, for the motion.

J. C. Dimmick, opposed.

ROBERTSON, J. This is a motion by the plaintiff to set down a cause already on the Trial Term General Calendar, and reserved generally, on the Day Calendar; and is opposed upon the ground that it is not a cause in which the plaintiff has a right to insist it shall be tried by a Jury. This ought properly to come up on the trial when a Jury is claimed, but the parties prefer having it decided.

The original complaint was filed principally to recover certain lands held by the defendant Cowles, alleged to have been purchased by him in a fiduciary capacity for the plaintiff, and also damages for other acts of his. Since that time, a supplemental complaint has been filed, alleging that the title to such land has passed from Cowles by virtue of the foreclosure of certain mortgages, and that such foreclosure was procured by him to prevent the plaintiff from obtaining title thereto; such supplemental bill also avers that the value of said land exceeded the mortgages thereon by a certain sum, which the plaintiff claims as damages, and he also claims therein all relief asked for in the original complaint, not inconsistent with that now asked for. The original complaint had, as parties defendants thereto, the wife of the defendant Cowles and the Housatonic Bank, and prayed that Mrs. Cowles and

Currie v. Cowles et al.

the Housatonic Bank might be decreed to relinquish all interest in the land in question, and that an accounting might be had of the moneys, and securities which the defendant Cowles had or has for the use of the plaintiff, and pay the balance found due.

Two questions arise on this motion: First, Whether, upon the state of facts as the plaintiff claims they now exist, an action at law could have been maintained by him before the Code; and, Secondly, Whether the effect of the supplemental complaint is to put the parties on the same footing as if the original complaint had been amended, or filed after the foreclosure of the mortgages.

I apprehend that as long as the proceeds of a breach of trust remained in land, the party injured was obliged to go into a Court of equity to reach it, but if they became money by a sale to a *bona fide* purchaser, an action either at law or in equity would lie to recover it. (*Brown v. Lynch*, 1 Paige, 147; *Reed v. Warner*, 5 Paige, 650.) And if the mortgages in question had been foreclosed before the commencement of this action, the plaintiff would have been entitled to commence a suit at law, if the defendant Cowles was his agent. And as it lay with the plaintiff to make it a suit at law or in equity, in other words, to try the action with or without a Jury, the election might still remain with him. But he was compelled to commence an equitable action, because the proceeds of the purchase was land, not requiring a trial by Jury, and he made parties, Mrs. Cowles and the Housatonic Bank, who are still parties to this action, and in regard to whom no trial by Jury could be had, because no common law judgment could be rendered. The supplemental complaint merely grafts a new proceeding on the old action, on which there may be a different judgment; both causes may be heard together, but the plaintiff may succeed on his original cause of action, and fail on his proposed modification of it. As neither party, therefore, could insist on a Jury trial upon the original complaint and issues, I think they still remain equally debarred from doing so, notwithstanding the

Howard v. The Orient Mutual Insurance Company.

supposed change of affairs by the facts stated in the supplemental complaint.

The motion must be denied without costs.

THOMAS HOWARD, Plaintiff, v. THE ORIENT MUTUAL INSURANCE COMPANY, Defendants.

1. The Court will not entertain a motion to suppress answers in a deposition taken on commission, upon an objection going, not to the regularity of the execution of the commission, but merely to the admissibility of the witnesses' evidence.
2. In interrogatories to take the deposition of a witness upon commission, a cross-interrogatory, asking if a log-book was kept, on a certain vessel, and if so, whether it did not contain a statement upon a subject in question, and requiring the witness to produce the log-book, is not sufficient to require the book or a copy of it, to be annexed to the deposition. The witness should be required to annex a copy, if it be desired, to make it an exhibit.

Special Term, October 21, 1862. Before ROBERTSON, J.

THE facts of this case are stated in the opinion of the Court.

A. Hamilton, Jr., for the motion.

F. Boardman, for plaintiff, opposed.

ROBERTSON, J. The motion now made is to suppress depositions taken on a commission issued by the plaintiff, to England, or the answers of a witness to certain interrogatories annexed to such commission.

This action is brought on a policy of insurance, for damages to the plaintiff, for the consumption of merchandise belonging to him, for fuel to supply the steam engine of the vessel in which they were being carried, which, by stress of weather, was delayed in her voyage, so as to render the consumption of such merchandise, as fuel, necessary.

Certain direct interrogatories annexed to such commission are directed to be administered to the captain of such

Howard v. The Orient Mutual Insurance Company.

vessel, (6th, 7th, 8th, 9th and 10th,) in reference to the existence, consumption and destruction of fuel on board of such vessel, which are answered by him without any reference to any book or memorandum.

The following is put to such captain, and numbered as one cross-interrogatory (2d):

"Did you, or not, keep or have kept on board of said steamship, a log-book of the voyages while you were master, and if so, where is said log-book? In whose possession or control is it? Produce the same, if you have it? Or state why you do not produce it? Was or not an engineer's log-book kept on board said steamship? If it was, where is it now? When did you last see it, and where? In whose possession or control is such log-book now? Does not such engineer's log-book contain a statement of the whole quantity of fuel on board at the time of starting on each voyage, and of the daily consumption of fuel and the quantity remaining, and also remarks upon the subject of the fuel? If you know where such engineer's log-book is, or can procure it, produce the same? If not, state why you do not produce it?"

The next cross-interrogatory asks the witness, in case he does not produce the log-books, to state whether his answer to certain direct interrogatories are from recollection; or if not, from what sources he refreshes his memory.

The witness, in answer to the first of such interrogatories, produced his own log-book, having obtained it from the ship-owners for the purpose. He also said "There was also an engineer's log-book kept on board the said steamship; such last mentioned log-book is now also produced to him, having been obtained from the owners for the purpose of this inquiry. He further answers the special inquiries as to the contents of such log-book in the affirmative. To the other cross-interrogatory the witness answered that the log-books have been produced, and he had answered the direct interrogatories referred to therein, from recollection and an examination of such log-books.

Howard v. The Orient Mutual Insurance Company.

I do not think I can now properly entertain the motion to suppress the answers to the direct interrogatories objected to; the objection goes not to the irregularity of the execution of the commission, but the admissibility of the witness' evidence, as resting on independent recollection or the contents of the books.

The fact of the engineer's log-book required being in the custody of third persons, would not be an excuse for not annexing it, or a copy, if produced before the Commissioners. In such cases a copy may be substituted. (*Comm. Bank of Penn. v. Union Bank of N. Y.*, 19 Barb., 391; *S. C.*, on appeal, 1 Kern., 203; 6 Cow., 444.)

The Revised Statutes provide, (2 R. S., 394, § 16, sub. 3; same statute, 5th ed., p. 676:) "If any exhibits are produced and proved before them, they shall be annexed to the depositions." The sole question, therefore, is whether the cross-interrogatory in relation to the log-book of the engineer was put in such form as to require it to be made an exhibit; otherwise the witness had a right to look at the book produced and testify, without annexing any copy to his answer. (*Steinkeller v. Newton*, 2 M. & R., 372.) Of course, as the physical book itself is not required to be annexed, there can be no substitute for it, so as simply to prove the appearance of the book. If the contents were required to be produced and proved, it then became an exhibit. The mere production of the book physically, before the Commissioners, would not enable either party to get at its contents, unless the interrogatory pointed at such contents. The owner of the book might possibly object to an examination, and for that reason it might never have been made, or have been waived; but the interrogatory must require such an examination, in order to satisfy the Court that the Commissioners and the witness have not done their duty, and attempted, at least, to get at such contents by inspection at the time of the examination. I apprehend it is not enough to ask a witness, by an interrogatory annexed to the commission, if a book produced is a certain book of account, and if he answers

Howard v. The Orient Mutual Insurance Company.

in the affirmative, object to the deposition, because it does not have a copy of the contents of such book annexed. Parties are not entitled, on the examination of a witness by commission, any more than in Court, to have the whole of the contents of a book belonging to another person, although identified, inspected. The fact of the existence of an engineer's log-book was, by such cross-interrogatory, inquired into and proved; also that of its contents; the latter, however, only according to the witness' recollection of them, because he was not even requested to look at that log-book in testifying. But no one was required to testify as to the exact contents of such book, or read it, or verify a copy of entries in it. Indeed it would not seem that the character of such entries were of any importance, as their identification by the master would not make them evidence; the more important object seems to have been to lay the foundation for the next interrogatory, and the objection to the witness' answers to several direct interrogatories, as being derived from such books, and not acts of independent memory. There being no request in such interrogatory to the witness, to look at the contents of the book, or annex a copy of them, it was hardly an exhibit, except in its closed state, as being the book kept by the engineer, in order to refresh the memory of the witness as to its existence. It has always been usual in interrogatories as to written documents, to require witnesses to annex copies, where they were intended to be exhibits, and I do not see why this, or something equivalent, is not an essential test. The witness could, in this case, have answered all the interrogatory without producing or seeing the book, and his answer would have been properly taken and regular; I do not see why his testifying, in addition, that such book was present, required it, or a copy, to be annexed, any more than if it had been any other physical object.

If the contents of the engineer's log-book, or the book itself, be necessary for the defendants, they are at liberty to take measures for its production; or if they intended to get at its contents by this interrogatory, the Court

Treadwell et al. v. Williams et al.

would probably afford them an opportunity of correcting the accidental slip. I do not think, however, the commissioners decided erroneously in supposing the contents of the engineer's log-book were not required to be annexed by the interrogatory in question; but the motion must be denied with seven dollars costs to the plaintiff to abide the event.

JOHN P. TREADWELL *et al.*, Plaintiffs, v. THOMAS WILLIAMS *et al.*, Defendants.

1. A conveyance, by one member of a solvent firm, of his undivided interest in the real estate of the partnership, to a stranger, whether made upon a sale, or by way of payment of his individual debt, is valid as against the copartners; and they cannot maintain an action to have it set aside on the ground that it was made without their consent, and impairs the credit of the firm.
2. If creditors do not object, the purchaser takes a good title, and it does not lie with the other members of the firm to object; or, at least, to enable them to do so they must show that the partnership debts exceed the assets, and that there is need of the property in question to provide for the deficiency and equalize the interests of the partners.

Special Term, October 25, 1862. Before MONELL, J.

THIS action was brought by John P. Treadwell and Chester Lamb, two members of the firm of Treadwell, Whitcomb & Co., against Thomas Williams, Jr., and Virgil Whitcomb, the latter of whom was the third member of that firm. The relief sought was to have a conveyance which Whitcomb had made, of his undivided interest in real estate of the partnership, to Williams, set aside, on the ground that it was made without their consent and impaired the credit of the firm.

The cause was tried before the Court without a Jury at a Special Term, and the following opinion delivered by the Judge, upon the decision, on October 25th, 1862.

A. J. Vanderpoel, for the plaintiffs.

W. S. McCoun and *J. Burrill*, for the defendants.

Bosw.—VOL. IX. 82

Treadwell et al. v. Williams et al.

MONELL, J. At the date of the conveyance from Whitcomb to Williams, Whitcomb was confessedly the owner of five-twelfths of the copartnership property and effects of the firm of Treadwell, Whitcomb & Co. This property consisted of the lease of the St. Nicholas Hotel, furniture and good will, and also of certain real estate, which during the partnership had been purchased, with partnership funds, for partnership uses and purposes, and was occupied and used in conjunction with their leasehold property for their hotel and partnership business. I have no difficulty in finding that this real estate, so purchased with partnership funds, and for partnership purposes, became and was partnership property, and is therefore subjected to all the rules governing partnership property of a personal nature, except those of transmission and descent. I am not prepared to say that the circumstance of its having been purchased for partnership purposes and with partnership funds necessarily converts it into personal estate. The law on that subject is unsettled, and I believe I am safe in declaring, that in this State the Courts with much uniformity have always held such property to be real and not personal estate. (*Buchan v. Sumner*, 2 Barb. Ch., 165.) It is not necessary, however, to consider that question here. It is quite immaterial whether it be real or personal estate. It is enough that it is partnership property, and that Whitcomb's interest has been conveyed to his individual creditor.

There is no allegation in the complaint, nor was there any proof before me, that the firm are insolvent. On the contrary, I think the proof shows that they are not insolvent. Mr. Treadwell himself testified that the firm could pay their debts, and he rejected any idea that they were or could be supposed to be insolvent.

The defendant Williams was a creditor of Whitcomb, to the amount of \$15,000, which formed a part of the consideration of the deed. There was evidence that Williams, at the time of the conveyance, paid Whitcomb the further sum of \$20,000, making a total consideration of \$35,000. There was therefore sufficient consideration to uphold the

Treadwell et al. v. Williams et al.

conveyance, as between the parties to it, and if Whitcomb had the right to convey, Williams gets a good title.

Under this state of facts the plaintiffs seek to set aside the deed, upon the sole ground, that, the premises conveyed being partnership property, Whitcomb could not convey his interest without the consent of the other members of the firm.

The creditors of the firm are not actors in their own behalf, seeking to compel a devotion of the copartnership property to the payment of the partnership debts; but a member of the firm, upon the allegation that there were creditors, and that the property conveyed was needed to furnish security for loans required by the firm in carrying on its business, seeks to compel a cancelment of a deed by his copartners as interfering with the successful prosecution of their joint business.

The law is well settled that partnership property must be applied to the payment of partnership debts, (*Wilson v. Robertson*, 21 N. Y. R., 587,) and neither can one, nor all the members of a firm, by any other disposition of their joint property, deprive their creditors of this right. Hence, one partner cannot pledge or convey the partnership property as security for his individual debt, so as to defeat the partnership creditors of their equitable lien. But in the absence of creditors of the firm interposing to ask the aid of the Court to protect their lien, I do not understand that a member of a firm, as between himself and partners, may not dispose of his interest in the firm's property, so as to give a good title to the transferee, whether he be his individual creditor or a purchaser for value.

It was in evidence before me that at all times the firm have been heavy borrowers of money, carrying along a floating debt of upwards of \$250,000, and needing all their property to furnish security for loans and indorsements. But there was no evidence given or offered, that there were any creditors who were in a position or desired to enforce their equities against this property, or to compel its application to the payment of the partnership debts.

Treadwell *et al.* v. Williams *et al.*

Nor do the plaintiffs ask for a dissolution of the copartnership and a winding up of the partnership concerns, nor even for an account by Whitcomb, of the proceeds of the sale and a restoration thereof to the partnership fund. The only allegation upon which the plaintiffs found their claim to the relief sought by their complaint, is, that Whitcomb could not convey, and that Williams took no title. And they assert that, at their suit, the conveyance should be set aside and declared null and void. It may be that if this suit had been instituted by one of the creditors of the firm, who had failed to obtain satisfaction of his debt out of the remaining partnership property, such creditor, upon the allegation and proof of the insolvency of the firm, would be entitled to a judgment avoiding this conveyance, and declaring it to be null. That would be so, upon the principle already stated. But it seems to me that the right of one partner to transfer to a purchaser his interest in the partnership property, does not admit of argument or doubt. If creditors do not object, the purchaser takes a good title, and whatever effect such disposition may have, as working a dissolution of the copartnership, (if such would be the effect, Story on Part., §§ 306, 308,) or otherwise, it does not lie with the other members of the firm to object. I have looked in vain for any case which goes to the length of declaring such a transfer void at the suit of the remaining partners; but the books are full of cases where such a transaction has been adjudged a fraud upon the rights of creditors, where the creditors themselves have been the actors.

The cases most relied on by the plaintiffs' counsel, in support of their action, are *Dyer v. Clark*, (5 Met., 562,) *Richardson v. Hastings*, (7 Beav., 301,) and *Ormsbee v. Davis*, (5 R. I., 442.)

In *Dyer v. Clark* the bill was by the surviving member of a firm against the administrators, widow and minor children of the deceased member. The deceased, in his lifetime, had conveyed his interest in certain real estate of the firm held as partnership property. The bill did not

Treadwell *et al.* v. Williams *et al.*

seek to set aside the deed, but to have the proceeds of the sale applied to the payment of the partnership debts. Here was a partnership dissolved by the death of one of its members, and it was properly decided that the survivor, being primarily liable for the partnership debts, was entitled to the custody of the partnership property and to the proceeds of such as had been disposed of by the deceased member, to enable him to satisfy the claims of creditors. The opinion of the Court contains no *dictum*, nor is there any principle to be evolved from the case, which sustains the position of the present plaintiffs.

In *Richardson v. Hastings*, the bill was filed by R. in behalf of himself and other members of a club, against Hastings and Emly, also members, for an account of the proceeds of club property sold by them. The bill also prayed for an account of the other assets of the club, and a dissolution and winding up of the concerns of the club. The bill did not seek to reach the property conveyed, but merely an account of the proceeds. The accounting was ordered, it being a proper case for such a judgment. The master of the rolls goes further than any of the other cases, and asserts it to be a principle of Courts of equity to entertain a bill between partners, to settle a question which may arise between them without winding up the concerns of the partnership.

In *Ormsbee v. Davis*, the suit was brought by an attaching creditor of the defendants. The defendants' firm of James W. Davis & Co., composed of J. W. Davis and Thomas M. Hathaway, were indebted to the firm of Watson & Field, who had assigned their property to S. J. Watson, for the benefit of their creditors. Davis, one of the firm of Davis & Co., in the absence and without the consent or concurrence of his copartner, Hathaway, made a general assignment in the name of the firm, of all their copartner-ship property to S. J. Watson, for the benefit of the creditors of Davis & Co., giving a preference to the claim of Watson & Co. Subsequently, Davis, in the name of his firm, but again in the absence and without the consent of

his partner, executed to Watson an absolute bill of sale of certain specific property of the firm. The assignment and bill of sale were attacked by the plaintiff, a creditor of the firm. The Court held the assignment made by one partner, without the concurrence of the other, void as to the creditors of the firm. But the bill of sale executed under similar circumstances was upheld. AMPs, Ch. J., says: "The subsequent bill of sale of a portion of the copartnership property to the garnishee, in payment of, or rather, as he explains it, in security for the debt due from the defendants to Watson & Field, which had been assigned to him, seems to have been within the competence of either of the copartners, without the knowledge or assent of the other, and must be held a rightful appropriation of the property embraced in it, so far as needed, to the payment of that debt."

Applying the principle of these cases to the one now under consideration, we see that they fall far short of establishing the plaintiffs' right to the relief they demand. They do not ask a dissolution of the partnership, nor an accounting, by Whitcomb, of the proceeds of the sale to Williams. They do not allege the insolvency of the firm, nor the inability of Whitcomb to respond for his share of the copartnership debts. Before it is ascertained that the debts will not all be paid, or that the value of the interest conveyed to Williams is less than the value of Whitcomb's interest in the remaining property of the firm, after the payment of the firm debts, I am asked to declare the deed to Williams void, and to compel him to convey the property back to Whitcomb, that it may be used, not in payment of firm debts, but as security for the firm's floating debts. It appears quite clear to me that the plaintiffs are not in a condition to obtain such relief. They have failed, I think, to make out a case authorizing any interference with the conveyance to Williams, which shall deprive him of his right to hold the property.

It was supposed by the plaintiffs' counsel that the equities and rights of creditors might be worked out through

Treadwell *et al.* v. Williams *et al.*

the partners; and such, undoubtedly, is the text of the elementary writers. But I apprehend that such rights and equities must be sought for by the creditors themselves, working them out through the equities of the partners, to have the partnership property applied to the payment of the partnership debts. In other words, that the creditors must apply to have the equities of the partners enforced and not the partners themselves. That is what I understand to be the meaning of the elementary writers, that the rights of creditors may be worked out through the partners.

I cannot discover that any fraud is to be imputed to Williams. The evidence has warranted me in finding, as a fact, that he knew that the property was owned by Whitcomb, jointly with the other members of his firm. But as Whitcomb had the right to convey the property, so Williams had the right to receive it; and he cannot be deprived of that right, except, perhaps, at the instance of creditors of the firm. If I am right in my view, that none but creditors can object to the validity of this conveyance, then it is wholly immaterial whether Williams took it with notice that it was partnership property, or whether there was a sufficient consideration to uphold it. As between Whitcomb and Williams, it was effectual to vest the latter with a valid title to all the interest the former had in the property. Had the suit been instituted by creditors of the firm, the *bona fides* of the transaction might have been involved.

But if the views which I have thus briefly stated, of the rights of partners in respect to their copartnership property, should not be sound, there is another reason why, under the pleadings and proofs in this case, the action cannot be sustained. I think it cannot be questioned that whatever interest in the partnership property may remain to Whitcomb after the payment of the partnership debts, may be transferred by him to his individual creditor. Therefore, until it is shown that the debts exceed the assets of the firm, and that there is need of this property

Hornby v. Gordon.

to provide for a deficiency, and to equalize the interests of the other partners in the capital of the firm, this conveyance cannot be disturbed. No such state of facts exists. On the contrary, the clear weight of the evidence is, that the firm, except, perhaps, upon a forced sale, can pay its debts and reimburse its members their capital. No danger is apprehended, or at least stated, that the creditors will urge their claims to judgment or subject the partnership property to a forced and sacrificing sale; and until the happening of such an event, the plaintiffs have no cause of complaint.

For all these reasons I am satisfied that the plaintiffs possess no equities which would authorize or justify the Court in interfering in their behalf.

The defendants must have judgment, dismissing the complaint, with costs.

FREDERICK HORNBY, Plaintiff, v. WILLIAM GORDON, Defendant.

1. The provision of the Code of Procedure—that in actions for recovery of real or personal property, third persons, having an interest in the subject matter, may be brought in as parties, upon their own application—is only intended to extend the power formerly possessed by Courts of equity, in this respect, to the legal actions designated; and its application is confined to the class of cases in which a bill of interpleader would have accomplished the same end.
2. In an action brought by a vendor of goods, to recover possession of them, on the ground of fraud on the part of the purchaser, third persons claiming, under the purchaser, by virtue of contracts with him, and in hostility to each other, should not be granted leave to come in as parties.

Special Term, November, 1862. Before MONELL, J.

IN this action two motions were made, under section 122 of the Code of Procedure, by different persons, to be made parties defendants.

The action was for the recovery of the possession of specific personal property. The facts, as gathered from the papers, were as follows:

Hornby v. Gordon.

About the 14th of March, 1862, the plaintiff sold to the defendant twenty-five hogsheads of tallow, to be paid for in cash on delivery. The defendant, without the knowledge or consent of the plaintiff, obtained possession of the tallow, without making payment, placed it on board the ship *Equator*, then lying at Pier No. 16, East River, in the City of New York, and procured from the captain triplicate bills of lading. One of the bills was left with the captain, and the other two were delivered to the firm of De Rham & Co., of this city, who made an advance thereon, to the defendant, of the sum of \$2,148.50.

On the 15th of March, this action was commenced, and the property taken by the Sheriff, under a requisition of claim and delivery. Whether it had been delivered to the plaintiff did not appear.

On the 17th of March, Meritz Von Therlew, the captain of the ship, served upon the Sheriff a notice that he claimed the tallow; that, as master, he had become liable to the consignees for the value of the tallow, and that he had a lien thereon for freight and charges.

On the 18th of March, De Rham & Co. served on the Sheriff an affidavit, stating the advance made by them upon the bill of lading, and a notice requiring him to deliver the tallow to them, and not to the plaintiff.

The master Therlew, and the persons composing the firm of De Rham & Co., now made separate applications to be made parties defendants to the action.

The merits of the respective claims of these parties were not involved in these motions.

William Betts, for the applicants.

Edward Fitch, for the plaintiff, opposed.

MONELL, J. The section of the Code under which these motions are made (§ 122) provides that "when, "in an action for the recovery of real or personal property, a person not a party to the action, but having an "interest in the subject thereof, makes application to the

Hornby v. Gordon.

"Court to be made a party, it may order him to be brought in by the proper amendment."

This provision is new, and has not, except in one case, that I have been able to find, received a judicial construction. The codifiers, in their notes, (Code, as reported, p. 251,) say: "The object of this section is to save the necessity, in most cases, of an action to compel two parties, claiming the same thing, to settle the controversy between them by interpleading. The interpleader act in England was passed for the same purpose."

Under the practice, as it prevailed before the Code, the Courts possessed no power, in an action at law, either to bring in parties necessary to a complete determination of the controversy, or to allow a substitution of defendants, (except in the single action of ejectment, 2 R. S., 342,) or to allow parties claiming an interest in the subject of the suit to apply to be made defendants. It was otherwise in suits in equity, to the extent of allowing other parties to be brought in. But this was only done where it was necessary that other parties should be before the Court, in order to a complete determination of the controversy. (1 Barb. Ch. Pr., 321.)

The Legislature has deemed it proper to empower the Courts to add parties in all actions; and in those for the recovery of real or personal property, to allow persons not parties, to apply to be made such. They may, also, in these, and in actions upon contracts, upon the application of the defendant, allow a person, not a party to the action, who makes a claim to the same debt or property, to be substituted as defendant. But I do not think the Legislature intended to extend this power beyond that which was possessed by Courts of equity, in all cases which came under their cognizance, except in its application to certain actions at law; and that they meant to confine it, in principle and practice, to that class of cases where a bill of interpleader would have accomplished the same end. The section of the Code, as enacted, is the same as reported by the codifiers, and their construction of its intended

Hornby v. Gordon.

operation and effect is significant of the intention of the Legislature.

Assuming, then, that such was the design of this provision of the statute, let us apply the principles of interpleader to the applications made on these motions.

A bill of interpleader was allowed, where the complainant claimed no relief against either of the defendants, but where the defendants claiming of him the same debt or duty, by different or separate interests, he was uncertain with which of the claims he ought to comply; in which case he could apply to the Court for leave to pay the money or deliver the property to the one to whom it of right belonged, and thereafter be protected from the claims of both. (2 Barb. Ch. Pr., 117.) The object of the bill was to protect an innocent party against conflicting claims, where a recovery by one might not protect him against a recovery by another. It never, however, was allowed for any other purpose; and I cannot believe the Legislature intended to enlarge or extend this remedy of interpleader to cases not strictly coming within its principles. It cannot be that it was the design to stop the machinery of trials by letting in various and conflicting claims to the same property, whenever they might arise. But even if it were so, the power should be exercised by the Court with great caution, and with due regard to the rights of parties. Especially ought it not to be exercised where there are other and adequate remedies left to claimants.

In the case before me, the claims presented by the master and by the persons who made the advance, are different and inconsistent with each other. They arise under different rights, depend upon different principles, and are each antagonistic to the claim of the plaintiff. Each claim the property; one as owner absolute, another in virtue of a lien for freight and charges, the third on account of advances. But one can sustain the right to hold the property. The others must fail; and I cannot well see how, upon one trial, without much embarrassment, all these diverse and conflicting claims can be disposed of.

The Bank of Mutual Redemption v. Sturgis *et al.*

The applicants have their remedies against the Sheriff, which they have preserved by notice to him of their claims. These remedies, it seems to me, they should pursue in this case.

The motions must be denied, with five dollars costs, to be paid by each of the applicants to the plaintiff.

THE BANK OF MUTUAL REDEMPTION, Plaintiffs, v. WILLIAM STURGIS, Jr., *et al.*, Defendants.

1. Where one of several creditors of an insolvent, who all had an equitable lien on goods and securities of his in the hands of his factors, issued an attachment, and served it upon the factors, and they, being also insolvent and desiring in good faith to have the fund applied equitably among their consignor's creditors, procured a suit to be brought against themselves and him for that purpose, by certain of such creditors other than the plaintiffs in the attachment, the suit being on behalf of all such of the creditors as should come in and contribute to its expenses;

Held, that the instituting of such suit and the appointment of a Receiver therein, could not be deemed collusive, and a reason for the interference of a Court of equity in behalf of the attachment creditors.

2. A bailee of goods having a lien thereon for a sum far exceeding their value, who, when the goods are attached in his hands by a creditor of the bailor, certifies, in good faith, that he holds no goods for the benefit of the latter, does not thereby forfeit his lien.

Special Term, November, 1862. Before MONELL, J.

THIS action was brought by the plaintiffs, a corporation of the State of Massachusetts, against William Sturgis, Jr., William Shaw, Henry Shaw, Latimer Bailey, (composing the firm of Sturgis, Shaw & Co.,) and Robert Rennie, defendants. The plaintiffs had previously obtained judgments in the Supreme Court against Rennie, upon drafts held by them, which were drawn by him on the firm of Sturgis, Shaw & Co., and by them accepted.

In their complaint in this action, the plaintiffs, suing on behalf of themselves and other creditors to the same relief, alleged the recovery of such judgments; that Rennie had consigned large quantities of merchandise to Sturgis, Shaw

& Co., for sale, and that Sturgis, Shaw & Co., had accepted the drafts mentioned, and others held by other persons, in advance of sales, and held the goods and proceeds, and also a bond and mortgage given to them by Rennie, as security for such advances; that the plaintiffs had, in their actions in the Supreme Court, attached the property of Rennie, who was a non-resident, and served the attachments on Sturgis, Shaw & Co., on various days on and between the 7th and 26th days of February, 1862, who certified to the Sheriff that they held no property of Rennie for his benefit, and were not indebted to him; that these certificates were false and fraudulently intended to hinder the plaintiffs of their remedy; and they prayed for an injunction and the appointment of a Receiver, and that the respective liens on the goods and mortgage might be ascertained and determined, and the fund applied accordingly.

The proceedings in relation to the appointment of a Receiver in this action are reported, *ante*, p. 608.

The present action was commenced about the 11th day of March, 1862. About the 14th of February, previously, Gustavus A., and Ernest Scheidt, also creditors of Rennie, holding similar drafts, had commenced an action in this Court on behalf of themselves and all other like creditors who should come in, for similar relief; and on the 17th of the same month, perfected the appointment of a Receiver. As soon as the plaintiffs in the present action were informed that a Receiver had been appointed in the suit brought by the Scheidts, they applied to the Court, on petition in that suit, stating their attachments and judgments, and asking to be brought in as defendants therein. This application was denied, and, on appeal, the order was affirmed by the Court at General Term in December, 1862.

The object of the present action was to secure a priority over the claims of the Scheidts, to which the plaintiffs deemed themselves entitled by reason of the attachment proceedings in the Supreme Court.

The cause was tried, and the following decision rendered, in October and November, 1862.

The Bank of Mutual Redemption v. Sturgis et al.

F. N. Bangs and J. M. Van Cott, for plaintiffs.

A. F. Smith, for defendants.

MONELL, J. The object of this action, as I understand it, is to obtain the aid of the equitable powers of this Court, to remove alleged obstructions which the defendants, by their acts, have interposed to the effect and operation of the attachments issued in the actions at law. Beyond this, the general scope of the suit is the same, as in the suit of Scheidt against the same defendants. Both the suits are brought by holders of Rennie's drafts accepted by Sturgis, Shaw & Co., seeking to secure the application of the consigned property to the payment of those drafts and to prevent its seizure by the creditors at large of Sturgis, Shaw & Co.

The alleged obstructions are, first, the appointment of a Receiver in the Scheidt suit; and second, the certificate given by S., S. & Co., to the Sheriff, upon receiving a copy of the attachments.

There are allegations of fraud and of fraudulent practices on the part of S., S. & Co. towards the plaintiffs, in respect to obtaining renewals of some of the drafts, and in attempts to effect a compromise with the holders of the Rennie drafts. But the evidence has failed to sustain any of these allegations. Indeed, I feel justified in saying that I am fully satisfied that S., S. & Co. have, so far as the evidence shows, dealt fairly, justly and honestly with the plaintiffs, and have not sought to deprive them of any of their rights, or to defeat any of their lawful suits. The compromise which they desired to effect with the holders of the Rennie drafts was honorable and just. It recognized the trust fund and sought to apply it equally to those who in equity were entitled to it. It was within the power of S., S. & Co. to have deprived the plaintiff, and other holders of the Rennie drafts, of this property, by a sale or assignment for the benefit of creditors. But they desired to prevent their general creditors from partaking

of it, and to devote it to creditors who had an equitable lien upon it.

It is claimed that the suit brought by Scheidt and the appointment of a Receiver therein was collusive between the parties; was a fraud upon the rights of the plaintiffs, and was instituted for the purpose of defeating the lien of the plaintiffs' attachments. So far as there is any question of fact involved in these allegations, I have not had any difficulty in finding against the plaintiffs. I entertain no doubt that the object of the suit was to carry out compulsorily what S., S. & Co. had failed to obtain through their compromise paper; and to distribute, by the judgment of the Court, the consigned property to and among the holders of the Rennie drafts. It is quite immaterial that this suit was instigated by S., S. & Co. The evidence as to that is slight and perhaps not sufficient to justify such conclusion. They could have interpleaded between their creditors, the holders of the Rennie drafts, and their general creditors, in respect to this property; and I see no reason why they could not have made a special assignment of the trust property to pay the Rennie creditors. If so, then why not institute an action in the name of one of these creditors to obtain the same end? As has been already said, the relief demanded by the plaintiffs in this action, and that sought in the Scheidt suit is the same; and except so far as the plaintiffs may have acquired some preference or priority through their attachments, they could have obtained all they otherwise ask for, by coming in and becoming a party to the Scheidt suit.

In this view, I am of opinion that the institution of the Scheidt suit, and the appointment of a Receiver therein of the consigned property and mortgage, furnished no reason for the interference of a Court of equity, and does not, *per se*, defeat or deprive the plaintiffs of any lien or right acquired by force of their attachments.

The main question therefore is, did the plaintiffs, by their attachments and the levy thereof, and the certificate given to the Sheriff by S., S. & Co., acquire any lien upon,

The Bank of Mutual Redemption v. Sturgis et al.

or preference or priority of payment out of the consigned goods and mortgage, which enables the plaintiffs to demand the judgment of this Court in aid of his judgments and executions at law?

The goods consigned, and the mortgage executed, by Rennie to Sturgis, Shaw & Co., were held as security for advances made, and for the payment of any ultimate debt from Rennie to them. This, therefore, was a bailment, and not a purchase. The bailees, in this case, had a lien upon the consigned goods and mortgage, to the extent of any indebtedness of Rennie to them. It was somewhat urged at the trial, that the outstanding acceptances of S., S. & Co. did not constitute such a debt as would authorize them to retain these goods as against the creditors of Rennie. There is no force in this. So long as the liability of S., S. & Co. continued to the holders of those acceptances, their right to and lien upon the consigned property remained.

At the time of the service of the attachments, the unpaid acceptances of S., S. & Co. amounted to about \$230,000, and they had in their possession about \$65,000 of consigned property, and a mortgage for \$150,000, upon which they had borrowed \$30,000.

The attachments were served on S., S. & Co., on the several days upon which they were issued, by leaving a copy with them certified by the Sheriff. No levy upon any property appears to have been made at that time, but a certificate, under section 236 of the Code, was demanded. S., S. & Co., accordingly certified to the Sheriff, that they did not, at the time of the service of the attachment, nor at any time since, nor did they then hold any property in their possession, or under their control, for the benefit of Robert Rennie, nor was there any debt owing by them to Robert Rennie.

That S., S. & Co. were not mistaken in regard to the legal title to the property consigned by Rennie to them, cannot be pretended. They undoubtedly supposed, that having advanced to Rennie much beyond the value of the

goods, his interest in them had ceased. Such, practically, was the effect, but until the goods were disposed of by S., S. & Co., the legal title to them remained in Rennie. S., S. & Co. had their lien; could sell at pleasure, and give a good title to the purchaser; but Rennie owned the goods, subject to the lien and right of his factors. Commission merchants as a class of factors, making advances to nearly or quite the value of the goods, are treated as the owners. (Story on Agency, § 111.) They sell in their own name, and deal with the property in every respect as if it were their own. Still they have but a special property in the goods, the general property remaining in the principal.

I think it is clear, therefore, that, at the time of the service of the attachment, S., S. & Co. had property in their possession belonging to Rennie, upon which they, as factors, had a subsisting lien to its full value; rendering the interest of Rennie in it of no value whatever. For the reasons stated, the certificates given by S., S. & Co. to the Sheriff were literally and technically untrue; but I cannot find from any of the proof in the case that they were given with any fraudulent or dishonest design, or with intent to hinder, delay or obstruct the plaintiffs in the pursuit of their remedies under their attachments. The technical falsity of these certificates, without a knowledge of the value of the consigned property, and the extent of the factors' lien, may have well induced the suspicion that there might have been some fraudulent motive. But the fact is now thoroughly established that the advances far exceeded the value of the goods, and that the interest of Rennie was, in reality, nothing whatever. If S., S. & Co. had certified that they had in their possession goods of Rennie of the value of \$65,000, upon which they had a lien for \$230,000, they would have complied strictly with the law; but no one can say that the plaintiffs would have gained any consolation from such a certificate. I am warranted, I think, in saying that the certificate which they did give was not given through

any corrupt design or intent to injure the plaintiffs, but through a mistaken notion of their interest in the goods.

It is claimed, however, by the plaintiffs, and herein lies the strength of their action, that the giving of this technically untrue certificate was a waiver by S., S. & Co. of their lien, as factors, upon the goods. If this were so, it might be that the lien of the attachments would be prior and superior to the title acquired by the Receiver, and a Court of equity might enforce such priority in aid of judgments and executions at law. But it is clear, I think, that such would not be the effect of it. The learned Chief Justice, when this case was before the General Term, upon an appeal from an order denying a motion for a Receiver, said: "It is not easy to see how the giving of that certificate can affect rights which had previously accrued to third persons who had no agency or participation in that act." And I understand it to have been conceded at the trial, that the creditors holding the acceptances of S., S. & Co., constituting their lien, had an equitable right to the consigned property. I assume this to be so, and for the purposes of this action, it is a complete answer to the plaintiffs' demand for relief. Such equitable right could not be divested by any act of S., S. & Co., which, as between them and their general creditors, might operate as a waiver of their lien.

But assuming this not to be so, have S., S. & Co., in effect, waived or lost their lien by giving to the Sheriff a certificate that they had not any property in their possession belonging to Robert Rennie?

I know of no elementary law or adjudicated case in which such an act has been declared or held to be a waiver of the factors' lien. The most that can be said is, that the denial of S., S. & Co. that they had any property of Rennie, might operate as an estoppel on them. The elementary treatises and cases to which I am referred by the plaintiffs' counsel, merely establish the general principle that a claim by a factor inconsistent with his actual right, may work a waiver of his lien. I do not regard the certifi-

cate given to the Sheriff as setting up any claim to the goods, incompatible with the right of S., S. & Co. They say they hold no property "*for the benefit of Rennie.*" This in one sense was true. They held the property for the benefit of Rennie's creditors, who had an equitable right to its application to the acceptances held by them.

In the absence of all fraudulent design; they having a not unnatural misconception of the nature of their rights and interest in the property, and a desire to have it distributed among the holders of the Rennie drafts, I cannot attach so grave importance to an act harmless in itself, as to give it the effect of a waiver of their lien.

The section of the Code which provides for the giving of a certificate, (§ 236,) also provides, that if the individual "refuse to do so, he may be required by the Court or Judge to attend before him and be examined, on oath, concerning the same;" and it has been held, that where a party served with an attachment certifies he has no property, it may be regarded as a refusal to give the certificate, if it can be satisfactorily established that the certificate is untrue. (*Carroll v. Finley*, 26 Barb., 61.) This remedy could have been pursued by the plaintiffs, and the nature of S., S. & Co.'s interest in the consigned property ascertained in a much more summary and economical mode than the one they have adopted in this action.

Upon a careful examination of all the questions raised by counsel, with the aid of the evidence in the case, I cannot bring my mind to any result favorable to the plaintiffs. S., S. & Co. do not seem to me to have lost their lien, and the right of the receiver to hold the property as against the plaintiffs in this action is unaffected.

As this view disposes of all the equity of the plaintiffs' complaint, the defendants must have judgment dismissing the complaint with costs.

Niblo v. Harrison *et al.*

WILLIAM NIBLO, Plaintiff, v. GEORGE HARRISON (by his guardian *ad litem*) et al., Defendants.

1. Where, pending a suit brought by a creditor to reach the assets of his debtor, the latter is, by proceedings previously commenced in another Court, adjudged to be an habitual drunkard, and a committee is appointed of his estate, the Court in which the former suit is pending cannot properly proceed to final judgment.
2. The plaintiff in such case, if he commenced his action in good faith, may be permitted to retain it; but his proceedings therein should be stayed, until the reformation of the defendant and the discharge of his committee, if such event should occur.
3. If a Receiver has been appointed, he should be discharged, on paying the moneys in his hands into Court.
4. *It seems*, that if the suit were in the nature of an action at law, the plaintiff might be permitted to proceed to judgment, upon which he may apply to the Court having jurisdiction of the estate to require payment from the committee.

Special Term, March, 1863. Before BARBOUR, J.

THIS action, which was in the nature of a creditor's bill, was brought by the plaintiff against George Harrison, Henry Harrison, as the Receiver of the estate and effects of the said George Harrison, Horace B. Claflin, William H. Mellen, Nathaniel Miller, Daniel H. Conkling and Henry Stone, the latter of whom were judgment creditors of the defendant, George Harrison.

The complaint alleged that the plaintiff had obtained a judgment against the defendant, George Harrison, upon which some forty parcels of land in the City of New York, belonging to the judgment debtor, were sold by the Sheriff, on execution; that such debtor had no further property liable to sale on execution, and that the execution had been returned unsatisfied as to a considerable amount, which still remained due upon the judgment; that the defendant, Harrison, was still in the possession of the premises, and in the receipt of the rents, amounting to some twenty or thirty thousand dollars a year; and that several months of the time fixed by law as the period within which the property

Niblo v. Harrison *et al.*

might be redeemed from the Sheriff's sale was yet unexpired; and the plaintiff prayed for the appointment of a Receiver of the rents, with directions to apply the same, or so much thereof as might be necessary, to the payment of the balance remaining due upon the judgment.

Before the action was brought, proceedings had been instituted in the Supreme Court, by petition, presented by the friends of the defendant, George Harrison, but without the actual knowledge of the plaintiff in this action, for the purpose of having Harrison declared an habitual drunkard, and obtaining the appointment of a committee; upon which proceedings a commission *de inquirendo* had been issued, and so far executed that a Jury had found the defendant to be an habitual drunkard.

After the commencement of this action, and before an answer was put in, the report of the commissioners. in those proceedings, was made and confirmed; and, thereupon, a committee of the drunkard were appointed, who duly qualified, and entered upon the discharge of their duties. An application was then made to one of the Justices of this Court, founded upon an affidavit setting forth the foregoing proceedings in the Supreme Court and under its order, for the appointment of a guardian *ad litem* to defend this suit for and on behalf of the defendant Harrison, and, also, that a Receiver of the rents, *pendente lite*, be appointed; which application was granted.

The answer interposed by the guardian *ad litem*, so appointed, set up all the above proceedings in the Supreme Court, including the acceptance of the trust by the committee. No answer was put in by the defendants, the judgment creditors.

Upon the trial at Special Term, all the material facts alleged in the complaint and answer, respectively, were fully proven, and the case was argued and finally submitted for judgment.

John Townshend, for the plaintiff.

B. F. Dunning, for the defendant Harrison, and his guardian *ad litem*.

Nible v. Harrison et al.

BARBOUR, J. As between the plaintiff and the defendant Harrison, considering the latter as of sound mind and unembarrassed by the proceedings before the Supreme Court, the plaintiff is, doubtless, entitled to the relief he asks for in his complaint. There is, certainly, no reason why a judgment debtor should be permitted to receive and enjoy the rents of real estate, to the amount of thousands of dollars, after his legal estate in the premises has been divested by a sale on execution, to the exclusion of creditors whose judgments remain unsatisfied. But the question here is, whether the defendant has such a standing before the Court, or is so represented in this action by the guardian who has been appointed to defend his interests, as will authorize the pronouncing of a judgment against him.

Under the old system of jurisprudence in this State, it was well settled, that, upon and by the appointment of a committee, on the return of a commission *de inquirendo*, all the estate of the lunatic or habitual drunkard, together with the guardianship of his person, became and was wholly vested in the Court making such appointment, and that the drunkard or lunatic was, thenceforth, incapable to make a valid contract, or to transact any business whatever; that no person other than the committee would be allowed to meddle with the property without their consent, and that any one, even a Sheriff with an execution in his hands, would be punished for contempt if he interfered with it; that no suit in equity or action at law could be brought against the drunkard or lunatic subsequent to his being so declared, nor, except upon leave granted by the Court of Chancery on petition, against the committee; and that, where an action at law had been brought against a lunatic before the report of the commissioners, but after the filing of the petition, such action would be stayed by injunction, if brought to the notice of the Court of Chancery. (*Matter of Heller*, 3 Paige, 199; *Matter of Hopper*, 5 Id., 489.) Where, however, the progress of such action was not stopped by injunction, but the same proceeded

Nible v. Harrison *et al.*

regularly to judgment, the judgment was held not to be irregular and void ; although, as we have seen, the creditor would not be permitted to enforce it without leave of the Court, granted upon petition. (*Id.* ; *Robertson v. Lain*, 19 Wend., 649 ; *Clarke v. Dunham*, 4 Denio, 262 ; *Brown v. Betts*, 13 Wend., 29.)

Although many of the distinctions between suits in equity and actions at law are now abolished, those rules in regard to lunatics and habitual drunkards are still as operative and binding as when first promulgated, for the reasons upon which they were founded remain unchanged. If, therefore, the action now under consideration was in the nature of an action at law under the former system, the plaintiff might, probably, be entitled to recover his judgment ; a judgment, to be sure, that he could not enforce by execution, but which would enable him to apply, by petition, to have it paid by the committee. The case in hand, however, is not an action at law, but is, entirely, a suit in equity by which it is sought to obtain the payment of the plaintiff's judgment, through the equity powers of the Court, after its power as a law Court has become exhausted upon its final process of execution ; and the judgment prayed for is, in few words, simply that a Receiver, to be appointed by this Court, shall take out of the hands of the committee, the property which has become vested in the Supreme Court, by the proceedings against the defendant as an habitual drunkard, and apply it to the payment of this claim.

I have no hesitation in deciding that this Court cannot, with propriety, render a final judgment in this action, as the matter now stands. If there was no other reason, the rules of comity, always observed toward each other by Courts of concurrent jurisdiction, would prevent the granting of a decree, as prayed for ; while, on the other hand, it seems equally clear that the complaint should not be dismissed, but the plaintiff ought to be permitted to retain his suit, commenced, as it was, in good faith, so that he may proceed to judgment against the defendant, upon his

Wright *et al.* v. Milbank.

reformation and the discharge of his committee, in case that event shall occur.

An order must, therefore, be entered, directing the Receiver, who has been appointed *pendente lite*, to pay into Court, to the credit of this action, all the moneys which shall have come to his hands, as Receiver herein, less his commissions; and that, upon such payment, the order appointing him be set aside and vacated; and also providing and directing that all further proceedings in this action be stayed, until the committee, so appointed by the Supreme Court, shall have been discharged, or until such further order of this Court, in the premises, as may be made, upon the motion of either party, on notice to the other.

Order accordingly.

ISAAC M. WRIGHT *et al.*, Plaintiffs, v. SAMUEL MILBANK, JR., Defendant.

The Court will not, in the exercise of its discretion, grant a third trial of an action to recover possession of lands, to a party who, upon the two previous trials, has lost his case, by overlooking a point of law, or conceding a fact, or by omitting to seek a remedy, by an appeal from an erroneous ruling on an unimportant question of evidence, unless he is shown to have been thrown off his guard. The fact that the defendant, in another cause, tried subsequently, succeeded, by raising the objections which were not raised in the present case, is not, necessarily, ground for granting the application.

Special Term, May, 1863. Before ROBERTSON, J.

THIS was a motion for a new trial, in an action in the nature of ejectment. The facts are fully stated in the opinion of the Court.

R. H. Shannon, for the defendant.

S. E. Lyon & T. Westervelt, for the plaintiffs.

ROBERTSON, J. This is an action to recover possession of certain lands in the City of New York. It has been

twice tried, once by the Court without a Jury, and once by a Jury; in both cases the issues were found for the plaintiffs. After the first trial, a second one was obtained, under the statute, on payment of costs, without reference to the merits. A third trial is now asked for, upon the ground of a different result in an action brought for an adjoining piece of land, tried since the issues in this.

The subject of controversy seems to have formed part of a larger piece of land, laid down on maps in possession of officers of the Corporation of the City of New York, who were the source of the defendant's title, as a street called Cheesman street, sixty feet wide. The principal question involved in the trial of the issues in this cause, on both occasions, seems to have been, whether the site of half such street, including the premises in question, were embraced, or not, in a grant by the Sheriff of New York, on a sale by him, on execution against Medcef Eden, from the grantees in which the plaintiffs claimed title? In other words, whether such grantees, or those claiming under them, owned such half, and contributed it to form a public highway merely, which, being disused, lapsed back to them?

The existence of such street as a highway, and therefore its formation by contributions of adjoining owners, was sought to be proved, on both trials, by admissions supposed to be contained in maps, in possession of officers of the Corporation of New York, and in descriptions of other pieces of land, given in certain deeds thereof, executed by them, as well as by the dimensions of other neighboring pieces of land, leaving the dimensions called for by the Sheriff's deed of Eden's interest, which was the source of the plaintiffs' title, such as to require the width of one-half of such street, to make up the quantity thereby conveyed. There was also some evidence offered, in order to show the inclosure of the premises by fences, and the occupation of the land in question with other adjoining land, by tenants of the testator of the plaintiffs. On the other hand, this was met by evidence, tending to show the exclu-

Wright et al. v. Milbank.

sion of the site of such street from the land conveyed by such Sheriff's deed, by a wall, with or without fence upon it, as far back as the execution of such deed; and by admissions supposed to be made by the testator of the plaintiffs, in conveyances executed by him, in the description of the premises conveyed. Calculations were made and explanations given by experienced surveyors, in regard to the condition, dimensions, designation and ownership, of all the circumjacent land, and diagrams furnished. This case seems to have been decided by the Court, on the first trial, and to have gone to the Jury on the last, solely upon the question of fact, as to the location of the land, as described in the before mentioned Sheriff's deed of Eden's interest, and the inclusion within it of the premises in controversy.

The evidence of admissions, fences, inclosures, and the existence of a highway, seems to have been only admitted as auxiliary to establishing that. There was no question raised as to the title or possession of Medcef Eden to such land in controversy, or any attempt made to claim a subsequent adverse title, by actual inclosure. It was assumed by the Court, parties and counsel, either that he was owner or in possession, or that by some operation of law the Sheriff's deed transferred some title or right of possession of his to the parties from whom the plaintiffs claimed title, unless there was a subsequent actual occupancy, under claim of title.

On the trial of the other action, already referred to, substantially the same evidence was given by the same witnesses, showing the same title on both sides, and involving the same question of fact as was determined on both trials in this case, in favor of the plaintiffs. And there was, as was understood by the Justice presiding at such trial, the same lack of evidence as to any title or possession in Medcef Eden, or proof of subsequent inclosure of the premises in question, by others, under whom the plaintiffs claimed title. The case was entirely withdrawn from the Jury, and apparently disposed of by a dismissal of the complaint, on that ground. In the decision of the motion the learned Judge stated that a party is limited to the land

actually inclosed by him, when he shows no right but possession ; although, if the plaintiffs had shown ownership, by Eden, of lands of larger extent, an entry by a grantee of them, upon any portion, claiming title to the whole by a deed of them, would have operated as a possession of the whole. He also stated that there was no evidence adduced on such trial, of any fence between the Eden interest, conveyed by the Sheriff, and the adjoining lands of the City Corporation, at the time of such conveyance. That the only evidence of occupancy, by inclosure, was by a fence on the north side of Cheesman street, excluding, of course, the premises in question, from the possession or occupancy of those under whom the plaintiffs claim ; and there was no evidence of any subsequent occupancy or inclosure by any one, under whom the plaintiffs claim, to the time of trial. That in the year 1822 there was only one fence between the property of the City Corporation and of those under whom the plaintiffs claim ; and from that time down to the trial, the only occupation of the disputed ground was by the City Corporation, and persons claiming under them.

Whether the views expressed by the learned Judge, on such trial, be or not, the controlling law of the case, they are equally applicable to the evidence given on the two trials of this case ; and if the defendant omitted to insist on their application on such trials, and to except to a refusal to make it, or if, without such exception, there was anything in the charges in them, entitling him to a new trial, he cannot now avail himself of the statute, to make another experiment, in order to avoid the consequences of his neglect. The law is not made to assist the supine and sluggish. If the parties chose to concede, on both trials, for the purposes of such trials, and tried the issues on that theory, that if the Sheriff's deed of the Eden interest conveyed the land in question in terms, it passed the title and possession, in point of law, they ought not to be allowed to have a new trial, merely in order to withdraw that concession, and avail themselves of the new light thrown upon their case by the subsequent trial in the other case. I do

not understand that there is any conflict of opinion, so far as I can see, between the views of the different learned Judges who presided at the different trials. Those before whom this action was tried, left to the Jury the simple question of fact, whether the Eden Sheriff's deed included half of Cheesman street. The learned Judge before whom the other cause was tried, held that if it did, it was immaterial until some possession by Eden, or those under whom the plaintiffs claim, by inclosure or otherwise, was established. The defendant will not, therefore, be prejudiced in this case, by an unexpected subsequent subversion of a supposed settled doctrine of law, applied to his case, by means of a subsequent decision by a higher Court, even if that were a proper case for exercising the discretion under the statute, of giving him a new trial.

The only other point of difference between the trials, in this and the other case, was in the admission, in the former, of a copy of a map, called the Inkleberg Map, which it is claimed was admitted on insufficient proof of the existence or loss of the original, or else if admitted as the original, it was improperly admitted; that the original seems, by the printed case, to have been produced on the trial in the other case, and excluded, while the copy was admitted as coming from the possession of the City Corporation. The insufficiency of such proof was, or might have been, made the subject of an exception in this case, and of review upon an appeal, which has been neglected too long to enable the defendant to bring one. It certainly would not be a proper discretion for the Court to exercise, under the statute, to grant a second new trial, because the applicant had lost the opportunity of availing himself of an appeal, by reason of an erroneous decision of law. I do not see, besides, how the defendant would be benefited by the defect being cured, on a second trial, by the introduction of the original map. It would hardly be just, under such pretense, to enable the defendant to procure a new trial, to avail himself of the objection of want of proof of a good source of title.

I cannot find, therefore, anything in the present application, appealing strongly to the sense of equity of the Court, to warrant the granting of a third trial, as a matter of discretion, such as the discovery of new evidence would. The two trials are granted, not as a favor to either party, but to enable the Court to do justice, since it is held that each party is not entitled to two new trials, under the statute. (*Bellinger v. Martindale*, 8 How. Pr., 113.) In any action in which a title to land is concerned, which depends so much upon descents, devises, conveyances, legal proceedings and possessions, such difficulties may arise in regard to the proof, as far back as twenty years and upwards, of marriages, births and deaths, the existence, loss and contents of documents, actual surveys, maps, and inclosures, that some liberality is to be indulged, in granting new trials upon the discovery of new evidence. But I cannot think the same favor should be extended to a party who has lost his case by overlooking a point of law, or conceding a fact, or omitting to seek a remedy by appeal from an erroneous decision, unless something to throw him off his guard is established. There is nothing of that kind in this case, to commend the defendant's application to the favor of the Court.

Titles are settled by decisions and acquiescence in them, until the time for appeal has gone by. Parties deal on the faith of such settlement. In this very case, the defendant took from the City Corporation indemnity money for the failure of his title, and negotiated with the plaintiffs for an exchange of land. It would be unjust to unsettle them for any cause except that which would be productive of greater injustice by not doing so. Two trials, the decision of a Judge in one, and of a Jury in another, in favor of the plaintiff, and such long acquiescence, particularly so long after the discovery of the matters now set up as reasons for a new trial, ought to set the matter at rest, as against such reasons.

The motion must be denied, with ten dollars costs.

WELLS PHILLIPS *et al.*, Plaintiffs, v. WILLIAM F. BARTLETT, Defendant.

1. A complaint alleging that between specified days the plaintiffs sold and delivered to defendant, at his special instance and request, a large quantity of boots and shoes of a specified value, and that there is due and unpaid therefor a sum designated which he promised to pay them; but though often requested by them, has wholly refused, is sufficient on demurrer.
2. In an action by several plaintiffs to recover for goods sold and delivered, an allegation of partnership is not necessary, and the allegation of sale and delivery sufficiently implies that the goods belonged to the plaintiffs.

Special Term, May, 1863. Before ROBERTSON, J.

THIS action was brought by Wells Phillips and Albert Smith, against the defendant, to recover for goods sold. The defendant demurred to the complaint, the substance of which is stated in the opinion.

Mr. Harrington, for defendant.

G. L. Walker, for plaintiffs.

ROBERTSON, J. The complaint in this case alleges that between the first day of February and 27th of September, in the year 1862, "the plaintiffs sold and delivered to the defendant, at his special instance and request, a large " * * quantity of boots and shoes," of a certain value, and that there is due and unpaid therefor "a certain sum, " which the defendant promised to pay the plaintiffs, but "though often requested" by them, has wholly refused to pay it. The only cause of demurrer assigned is that the complaint does "not state facts sufficient to constitute "a cause of action."

It appears to me enough facts are stated to constitute a cause of action; whether they are stated with sufficient definitiveness and certainty to identify the contracts, or inform the defendant of what he is to meet, is not a question for a demurrer. The allegation of partnership is not necessary, or even that the goods belonged to the plaintiffs,

Taylor v. Richards et al.

which is implied in the sale and delivery alleged. Even the promise to pay is unnecessarily stated.

The demurrer must be overruled, and judgment given for the plaintiff, on the usual terms.

ALEXANDER TAYLOR, Plaintiff, v. AUGUSTUS C. RICHARDS et al., Defendants.

1. The objection that the allegations of an answer are hypothetical, is not available on demurrer.
2. A defendant in his answer, in order to avoid the cause of action alleged, need not confess it; he may aver that if any such contract as alleged was made, it was made jointly with other persons.
3. An answer setting up the non-joinder of third persons, averred to be jointly liable with the defendants, sufficiently alleges that they are still living, if it alleges that they reside at a place named.

Special Term, June, 1863. Before MONELL, J.

Demurrer to answer.

THIS action was brought to recover for the use and occupation of apartments in the City Assembly Rooms, in this city. The complaint also alleged a hiring by the defendants.

The defendant, Richards, in his answer alleged, that there was a defect of parties; that several persons, (naming them,) "all of whom reside in the City of New York," ought to be joined as defendants. The answer then proceeded to allege that "if" the defendants used and occupied the premises, or "if" they hired the same, or "if" they promised to pay the sum in that behalf mentioned in the complaint, it was jointly with said persons named.

To this answer the plaintiffs demurred, alleging that it did not constitute a defense to the action.

MONELL, J. The first objection to the answer is that it is hypothetical; that the defendant seeks to avail himself

Taylor v. Richards et al.

of a defect of parties only in the event of the plaintiff's proving a hiring, or a promise by the defendant.

The first answer to this objection is, that it is not available upon demurrer. (*Ketcham v. Zerega*, 1 E. D. Smith, 553; *Wies v. Fanning*, 9 How. Pr., 543.)

The second answer is, that pleading a hypothesis, as it is pleaded in this case, is not objectionable. Pleas totally inconsistent with each other are not a novelty. The "general issue," (which denied the making,) and payment or infancy, release, accord and satisfaction, statute of limitations, either of which admitted the making, and went only in avoidance, were always allowed—indeed, were necessary to enable the defendant to set up either of those two defenses. The Code, instead of abridging these characteristic pleas, has enlarged the right to plead as many defenses as the defendant may have. (Code, § 150, sub. 2.) Hence, in slander he may deny the uttering and justify. (*Butler v. Wentworth*, 9 How. Pr., 282.) It is, I believe, the constant and uniform practice to allow a defendant, with a general denial, to set up any new matter in avoidance of the plaintiff's cause of action, and which, by admitting the cause of action, is inconsistent with the general denial.

But matter in avoidance must be specially set up by answer. (*Wies v. Fanning*, 9 How. Pr., 543; *McKyring v. Bull*, 16 N. Y. R., 297.)

A defendant in order to avoid need not confess. He has a right to put the plaintiff to his proof, and is not to be shut out of his defense because the proof is strong enough to charge him. He has the right to say, I deny your alleged cause of action against me, but if you shall succeed in proving it, still I am not liable, because, &c. This view is in accordance with *Ketcham v. Zerega* and *Wies v. Fanning*, *supra*.

The remaining objection is to the substance of the new matter set up in the answer.

The answer does not, in terms, aver that the persons named as being justly liable with the defendants, are liv-

Cockroft v. The Atlantic Mutual Insurance Company.

ing persons; but the allegation that they "all *reside* in the City of New York," it seems to me, is a sufficient averment that they are living persons.

The Code, in abolishing form, and requiring substance to be stated in a pleading, has left the pleader to use such language, expressive of his meaning, as he may deem proper. In this case "reside" is equivalent to and synonymous with "live" or "living," the use of either of which words would be sufficient.

I must, therefore, hold the averment to be sufficient.

Judgment for the defendants upon the demurrer, with costs.

JACOB H. V. COCKROFT, Plaintiff, v. THE ATLANTIC
MUTUAL INSURANCE COMPANY, Defendants.

1. In an action on a policy of marine insurance, the defendants' remedy, to compel a disclosure by the plaintiff of the number of packages, or the quantity and nature of the cargo lost or injured, and the items of expenses incurred, is by requiring a bill of particulars, rather than by motion to make the complaint more definite.
2. Section 158 of the Code of Procedure authorizes the Court to order a bill of particulars in such case; and the fact that the usual preliminary proofs or adjustment of loss had been made before the action, does not impair the defendants' right to a bill of particulars.

Special Term, March, 1862. Before ROBERTSON, J.

IN this action the defendants, who were sued upon a policy of marine insurance, moved for a bill of particulars, or account of the items claimed.

ROBERTSON, J. It is plain that the plaintiff and defendants are not upon an equal footing as to the items of the plaintiff's claim, of which evidence is to be introduced. In other words, the defendants are not notified by the complaint what they are to meet on the trial. It is equally plain that the defendants ought to have a right to be informed thereof, either by compelling the plaintiff to

Hanel *et al.* v. Baere *et al.*

make his complaint more certain, or by a bill of particulars. I think the 158th section of the Code authorizes the Court to order the latter, and that the remedy is not by a change of the complaint.

Damages by perils of the sea, except as to the number of packages or quantity and nature of the cargo injured, cannot be further particularized; nor do I think the plaintiff entitled to call for the marks of any packages, as there is no evidence there were any. The items of expense for salvage and repairs of the vessel, and unlading and stowage of the merchandise on board, and the expenses of the plaintiff and his servants, in traveling or laboring for the protection of the cargo, are subjects of a bill of particulars, and should be given, so as to enable the defendants to produce evidence to the contrary, if they have it. The object of a bill of particulars is to confine the plaintiff to the items contained in it; it becomes part of the complaint; the preliminary proofs and adjustment of loss do not accomplish the same purpose.

The motion, therefore, must be granted, under the limitation before expressed. The costs of the motion are fixed at seven dollars, to abide the event.



EMIL C. HANEL *et al.*, Plaintiffs, v. FREDERICK BAERE *et al.*, Defendants.

1. The only disbursements which are to be allowed in adjusting the costs in a civil action under the Code of Procedure, are those specified in section 311 of the Code.
2. The expenses of exemplified copies of foreign documents are not taxable, especially where there is no affidavit that the documents were actually and necessarily used, or obtained necessarily for use.

Special Term, March, 1863. Before ROBERTSON, J.

THE plaintiffs in this action discontinued it after it was at issue, and the defendants, on entering judgment for their

Hanel *et al.* v. Baare *et al.*

costs, claimed among the disbursements an item stated thus :

“ Expenses of commission, \$31 22”

The affidavit to the disbursements stated that the defendants paid \$27.62 for exemplifications of the proceedings in the Tribunal of Commerce, at Paris, in France, set forth in the defendants' answer; that such exemplifications were procured by the advice of the defendants' counsel, for the purpose of being used on the trial of this action; and that the defendants also paid \$3.60, for postage on the commission sent to Paris to take testimony in this action.

Upon adjusting the costs before the Clerk, the sum of \$27.62, for the exemplification mentioned, was disallowed by the Clerk, and the defendants moved before the Court, at Special Term, for a readjustment of the costs in this respect.

C. B. Smith, for the motion.

George C. Barrett, opposed.

ROBERTSON, J. The item objected to was inserted in the bill of costs, as “*Expenses of commission, \$31.22.*” Only the ordinary affidavit was produced, of the sum having been paid or necessarily incurred. Three dollars and sixty cents of it was allowed for postage. The rest was for a copy of certain proceedings in French Tribunals, referred to in the defendants' answer. No expenses had accrued on the commission.

This item was probably sufficiently set forth in detail, as required by the 311th section of the Code of Procedure, and there was no surprise on the plaintiffs in calling it “commission” instead of “records.” There does not appear to be any repeal of the provision of the Revised Statutes, (2 R. S., [4th ed.,] 841, [653,] § 7,) which required an affidavit to be presented that copies of documents proposed to be taxed were “*actually and necessarily used, or were necessarily obtained for use,*” which was not produced in this case. The 311th section of the Code did not ori-

Cumming v. Egerton *et al*

ginally embrace in its specification of what might be included in necessary disbursements, either witnesses' fees or the compensation of commissioners. These were added by a subsequent amendment. It is plain, therefore, that the only disbursements to be allowed are those specified. (*Case v. Price*, 17 How. Pr., 348.) Even surveyors' fees, unless in partition or dower cases, are not allowed. (*Haynes v. Mosher*, 15 How. Pr., 216.) Copies of documents or records obtained from public officers in this State, may be charged as officers' fees, but there is no provision for copies of foreign documents, that I have been able to find. Under the original Code, only the fees specified by the 20th section of the act "concerning the fees of certain officers," (2 R. S., 634,) were allowed as disbursements allowed by law. (*Dewitt v. Swift*, 3 How. Pr., 282.)

The motion must be denied, with seven dollars costs.

RICHARD S. CUMMING, Receiver, Plaintiff, v. ABEL T. EGERTON *et al.*, Defendants.

1. It must now be deemed settled that a Receiver appointed in supplementary proceedings, represents not only the debtor, but the creditor, at whose instance he was appointed.
2. Such a Receiver ought not to employ the attorney of either the debtor or the creditor; but if he does so in an action against a third person, the latter cannot object.
3. A want of funds by a Receiver, to pay the costs of an action brought by him against a third person, in which he is unsuccessful, ought to be conclusive evidence of bad faith on his part, within the provision of the Code of Procedure, (§ 317,) which charges trustees with costs personally, when they have been guilty of bad faith.

Special Term, March, 1863. Before ROBERTSON, J.

THIS was a motion made by the assignee of a judgment debtor of whose estate a Receiver had been appointed in supplementary proceedings, to compel such Receiver to

Cumming v. Egerton *et al.*

employ a different attorney and counsel from that of the judgment creditor, in the present action commenced by such Receiver to set aside an assignment by such debtor to such assignee, as fraudulent.

ROBERTSON, J. This is an action brought by a Receiver of the defendant, Egerton, appointed in another court on supplementary proceedings on a judgment against him, to set aside a fraudulent conveyance. It seems to be settled too long to be questioned, that a Receiver in such case, acquires more than the interest of the judgment debtor; he takes the place of the judgment creditor; indeed becomes, in law, the assignee of both their interests, for the benefit of the latter. (*Porter v. Williams*, 5 Seld., 142; *Gillet v. Moody*, 3 Comst., 479; *Talmage v. Pell*, 3 Seld., 328; *Curtis v. Leavitt*, 15 N. Y. R., 12.) Formerly he was only assignee of the debtor. (*Green v. Hicks*, 1 Barb. Ch., 314; 8 Paige, 273; 1 Id., 637.) The origin of the change is not very clear, but at any rate the Receiver must now be considered as representing the plaintiff, at whose instance he was appointed, particularly to set aside a fraudulent deed to a third party.

The general rule undoubtedly is that a Receiver in an action cannot appoint, as his attorney, the attorney of either party, the reason of which is stated to be that he thereby assumes inconsistent duties. (*Ryckman v. Parkins*, 5 Paige's Ch. R., 545; *Wilson v. Poe*, 1 Hogan, 322.) If the parties do not object, however, a stranger cannot. (*Warren v. Sprague*, 11 Paige, 200.) It is very evident that a judgment debtor is not a necessary party to an action to set aside a conveyance as fraudulent against third parties, as he has no interest. In this case, perhaps, it was more necessary to make him a party, as his wife is claimed to be a fraudulent grantee.

If costs are not to be decreed against a Receiver, when unsuccessful, although he only represents the plaintiff in the judgment, it undoubtedly would lead to great abuses; as experimental suits on supplementary proceedings might

Forrest v. Forrest.

be used merely to harass and vex third parties. The 317th section of the Code of Procedure directs costs against trustees of an express trust to be chargeable only on the fund in their hands, unless they have been guilty of mismanagement or bad faith. It ought to be considered conclusive evidence of bad faith under that section, if they have no funds in their hands, to pay the costs of the successful party whom they have vexed by unnecessary actions; and the protection of such parties must be found in that. I regret that the rule, as established, does not compel Receivers, in cases like the present, to employ a different attorney from that of him, at whose instance he was appointed.

As the question is new, the motion must be denied, without costs.

**CATHARINE N. FORREST, Plaintiff, v. EDWIN FORREST,
Defendant.**

1. Until after an order has been made by a Court by whom a judgment of absolute divorce has been rendered in favor of a wife against a husband, requiring the latter to give a bond with surety, for the payment of an allowance awarded to such wife, in such judgment, and the failure of such husband and his surety to fulfill the condition, such Court is not authorized by the provisions of the Revised Statutes, (2 R. S., 148, § 60,) to sequester the estate of such husband, appoint a Receiver thereof, and apply it to the payment of such allowance.
2. Where security has been given by the husband in such case, by order of the Court for the payment of such allowance, it must first be resorted to and exhausted before his estate will be sequestered.
3. If such security consist of a mortgage, previously belonging to such husband, and assigned by him to a trustee to secure the payment of such allowance, and the latter has become in arrear by reason of the collection by the husband of the interest on such mortgage, in consequence of a failure to notify the mortgagor of the assignment, and the proceeds of such mortgage on a sale, would probably after payment thereof, of such arrears, be sufficient if invested at six per cent interest, to yield enough to pay such allowance, the Court, on the wife's application, will order such trustee to sell

Forrest v. Forrest.

the mortgage, pay the arrears from the proceeds of such sale, and invest the residue as security for the payment of such allowance, and apply the interest as received to such payment.

Special Term, October, 1863. Before ROBERTSON, J.

IN this action, which was by a wife, for a divorce, the plaintiff obtained a judgment granting the relief sought, and the judgment contained provisions that there should be allowed to the plaintiff for her support, the sum of \$4,000 a year, during the continuance in life of both of the parties, payable in quarterly installments in each year.

The judgment also directed the defendant to assign to a trust company, a mortgage in the sum of \$75,000, which belonged to him, to be held by the trust company as security for the payment of the allowance. The judgment of the Court is reported in 8 Bosw., 640, and its affirmance upon appeal in 25 N. Y. R., 501.

The plaintiff now moved to compel payment by the defendant, of the allowance which he had failed to make.

Nelson Chase and Charles O'Connor, for plaintiff.

James T. Brady and John Van Buren, for defendant.

ROBERTSON, J. The present application is made under the judgment at Special Term, in this action, as affirmed by the Court of Appeals, directing the payment of a certain sum quarterly, by way of allowance to the plaintiff by the defendant. That judgment directed a certain mortgage to be transferred to a trust company as security for the payment of such allowance, and reserved to the plaintiff the right of applying for further security. Part of such allowance is unpaid. The mortgage is not yet due, and the defendant has collected the interest thereon to the present time; so that it has furnished no means of paying the plaintiff the arrears of the allowance adjudged to her. It does not appear that any notice of the assignment of the mortgage, has ever been given to the mortgagor.

Forrest v. Forrest.

Besides the judgment in this case, the Revised Statutes provide, that a court may require a husband to give reasonable security for an allowance adjudged by it to his wife, and upon his neglect to do so, or the default of him and his surety to provide such allowance, sequester his personal estate and the rents and profits of his real estate, appoint a Receiver thereof, and apply such personal estate, and rents and profits, towards such allowance, from time to time as seems to it just and reasonable. (2 R. S., 148, § 60.) This contemplates furnishing personal security by sureties in the first place, but in case of any neglect by the husband and his sureties, the immediate appropriation of his estate to the payment of the allowance. The giving of such surety was intended for the ease of the husband until he failed to perform the order of the Court.

Some laches was committed in not giving notice to the mortgagors of the assignment of the mortgage, so as to stop the receipt of the interest by the mortgagee, the defendant. It is fair, therefore, to assume, *prima facie*, that the plaintiff was willing that he should receive it. Such mortgage having been considered *prima facie* good security for the payment of the allowance, and no circumstance having occurred to lessen its value as such, it should first be used and the remedy on it exhausted, before requiring a new security to be given. The mortgage is for \$75,000, and yields \$4,500 interest. If the necessary sum could be raised by its pledge, so as to pay the arrears without interfering with the current allowance, it should be done by the Receivers, the Trust Company. If not, the mortgage should be sold by them, the arrears paid from the proceeds, and the residue invested to meet the allowance. The interest of \$70,000, after paying such arrears, if obtained at six per cent, would exceed the amount of the allowance. If not sufficient, the plaintiff is to be at liberty to make a new application for further security.

I do not consider the Court authorized to sequester the defendant's estate under the statute, until an order has

Murray v. Smith.

been made directing a bond or undertaking with sureties, as security for the allowance, and there has been a failure to comply with the terms of such bond or undertaking, on the part of the plaintiff and his surety. The mortgage given has taken the place of such security to some extent, and, as it is available, should be first employed, it being a *quasi* sequestration of that part of the defendant's property.

The order must be drawn directing a sale of the mortgage in question, the payment of the arrears due, and the costs of the application, fixed at ten dollars, out of the proceeds, and the investment of the residue by the Trust Company, reserving liberty to the plaintiff to make any new application for further security she may be advised.

PETER MURRAY, Plaintiff, v. BARTLETT SMITH, Administrator, &c., Defendant.

1. The due publication, by an executor or administrator, of a notice requiring persons having claims against the estate represented by him to exhibit the same, with the vouchers thereof, within six months after its first publication, at a place which was neither his residence nor the place of the transaction of his business, but merely the office of his counsel, is insufficient to create the statutory bar against claims against the executors and administrators of an estate, by the like publication of a notice requiring claims against such estate to be presented, similarly sustained, "at the place of residence, or transaction of business," of such representative. (2 R. S., 88, § 34.)
2. Whether a publication in one paper alone is sufficient, and whether the order must not express that the Surrogate was of opinion that the paper, which he designated, was the most likely to convey information to creditors? Query.
3. The provision of the Code of Procedure, (§ 317,) preventing costs from being recovered against executors, &c., where they are exempt by the provisions of the Revised Statutes, is intended only to exempt them personally, and not to exempt the estate.

Special Term, December, 1863. Before ROBERTSON, J.

THIS was an action, commenced in November, 1843, to recover from the defendant a sum of money which the plaintiff alleged he had paid to the use of Hugh Smith,

deceased. After Hugh Smith's death, the claim was presented to Peter Smith, his executor, and rejected. The defendant, Bartlett Smith, as administrator, now represented the estate.

The cause was tried five times successively; on each of the first four trials the plaintiff recovered a verdict, but the defendant succeeded in having it set aside. In 1851, after the fourth trial, costs were adjudged to the plaintiff, at Special Term, by Mr. Justice PAINE, on the ground that "the executor refused to refer the claim pursuant to the statute, and that the payment of the same was unreasonably resisted." This order was affirmed on appeal, April 30, 1853, by a General Term, before DUER, CAMPBELL and BOSWORTH, J. J.

Upon the decision of the cause in his favor, on the fifth trial, the plaintiff now moved for costs.

Charles O'Connor, for plaintiff.

I. Payment of the claim "was unreasonably resisted." This, or even merely having "neglected" payment, after due demand, is a ground for allowing costs. (3 R. S., [5th ed.,] 176, § 46.)

II. Independently of the first point, the peremptory refusal to refer is, of itself, a sufficient ground for allowing the plaintiff's costs. (See same section; *Robertson v. Shell*, 3 Den., 161.)

III. The defendant is not entitled to make the point that he gave public notice to creditors, and that this claim was not duly presented. (*Halsey v. Reed*, 9 Paige, 451; *Bradley v. Burwell*, 3 Den., 261; *Gansevoort v. Nelson*, 6 Hill, 389, 392; *Russell v. Lane*, 1 Barb., 519; *King v. Holmes*, 11 Penn. St., 456.)

IV. The attempt to deprive the plaintiff of costs by the notice in the Brooklyn Evening Star must fail. (*Halsey v. Reed*, 9 Paige, 451; *Jenkins v. Wild*, 14 Wend., 545; *Arguill v. Smith*, 3 Den., 435; *Dayton's Surrogate*, 125; and see form No. 53, Id., [1st ed., p. 69, app'x.] *Minor v. London & N. W. Railway Co.*, 1 Com. Bench, N. S., [1 J.

Murray v. Smith.

Scott, N. S.,] 331; *Shiels v. Great Northern Railway Co.*, 2 Law Jour., N. S., Q. B., 332; *Corbett v. General Steam Navigation Co.*, 4 Hurl. & N., 482; *Belknap v. Hasbrouck*, 13 Abb. Pr., 418, note; *McEwan v. Burgess*, 15 Id., 473.)

H. W. Robinson, for defendant.

ROBERTSON, J. In February, 1837, Hugh Smith, the testator represented by the defendant, died, leaving a last will and testament, by which he made his wife and Peter Smith and two other persons executors thereof. At the time of his death he was a resident of Kings County. Letters testamentary were, in the same year, issued by the Surrogate of that county, to Peter Smith, named as executor in such will. In 1841, (about four years afterwards,) late in June, upon the *ex parte* application of the executor, Peter Smith, the Surrogate of Kings County, made an order, that a notice requesting all persons having claims against the estate of the deceased testator to "*present*" the same, with the vouchers thereof, to such executor, "*at the office of C. F. Grim, Esq., Attorney and Counselor at Law, No. 9, Nassau Street, New York,*" before a certain day, (Jan. 20, 1841,) more than six months thereafter, be published in (The Brooklyn Evening Star,) a newspaper printed in such county, once in each week, for six successive months, which notice, in such form, was so published. Nothing was said in such order respecting the Surrogate's "*deeming*" such insertion in such newspaper *most likely* to give "*notice to the creditors of the deceased.*" The claim in this action, made out in writing, properly verified by affidavit, together with a written notice offering to refer the same, if disputed, to three persons to be appointed by the Surrogate of Kings County, pursuant to the statute, by an agreement in writing, and to attend at the Surrogate's office, on two days' notice, for the purpose, and stating that if no such appointment was made, it would be deemed a refusal, was served on Peter Smith, the executor, in November, 1843, who stated that he rejected such claim, and might be considered as having refused to refer

Murray v. Smith.

it, unless he gave notice to the contrary in six days, which he never did. Nothing was said at that time of the publication of any notice, nor was any evidence given to show any knowledge by the plaintiff at any time before the commencement of this suit, of the publication of the notice in question.

It is claimed that the non-presentation of such claim until after the expiration of the time fixed by the publication of the notice before mentioned, was a bar to any claim for costs against the defendant to be levied of his property or that of the deceased. This is set up under the provision of the Revised Statutes of 1830, by which costs are prohibited from being "recovered against any executors or administrators, to be levied of their property, or of the property of the deceased, unless it appear that the demand on which the action was founded was presented within the time" fixed by the statute, "and its payment was unreasonably resisted or neglected, or the defendant refused to refer the same according to the preceding provisions" of such statute. (2 R. S., 90, § 41.)

The Supreme Court of this State has held that the designation by the Surrogate, of a newspaper in which to publish such a notice, if in the same county, rendered a publication in any other newspaper unnecessary. (*Dolbeer v. Casey*, 19 Barb., 149.) This leaves room, however, for considerable doubt whether a mere order for publication is sufficient without a formal adjudication, even *ex parte*, that a publication in such newspaper alone is deemed most likely to give notice to creditors, as required by the statute. (2 R. S., 88, § 34.) To sanction merely a publication in a newspaper is one thing, and to determine that such publication is most likely to give notice to creditors, is another. The latter requires the exercise of some discretion, and some materials, such as an affidavit of the residences of the creditors, on which such discretion might operate. The former Supreme Court of this State, decided at Special Term, that the statute, as to costs against executors, was peremptory, and admitted of no excuse to take a case out

Murray v. Smith.

of its operation, if proved to be in the category required. (*Bradley v. Burwell*, 3 Denio, 262.) Taking these two decisions as controlling, it will be necessary to examine how far the notice in question complied with the statute.

The publication of such notice is required to be begun at least six months after granting of letters testamentary, or of administration. The notice is only required to be published in one newspaper of the county where the letters were granted, and in such others, as on an *ex parte* statement, the Surrogate may be satisfied will be sufficient to give notice to the creditors of the decedent. Any heedless decision by him in that respect might inflict on creditors the burden of a long litigation at their own expense. The statute, however, requires an exhibition, by the creditor, of his claim, to the executor or administrator, and for that purpose, requires the place of such exhibition to be the residence or place of transaction of business generally by such representative, to be specified in the notice to creditors. (2 R. S., 88, § 34.) If it had intended the mere deposit of a written claim at a certain place to be designated, it would have said so. But it evidently intended to give each creditor an opportunity of a personal interview with the representative, by requiring him to be notified of the place of residence or business of the latter, so as to be able to find him, and know what he had to expect. The next section (§ 35) carries out the same idea by giving the executor, on such presentation, the right to require of the creditor, then present, satisfactory vouchers, and an affidavit in a certain form. If, after all this is done, he still doubts the justice of the claim, the claimant must propose to him to refer it, (*Proude v. Whiton*, 15 How. Pr., 304,) after which the executor resists at the peril of costs. The alternative of "residence or place of business" in such notice, shows an intent to designate something actually existing previous to and independent of the order, and not a factitious place of residence or business, created for the purpose, by the order. The provision as to the place, was for the benefit of the creditor, to enable him to find

Murray v. Smith.

the executor, as it was not necessary that his communication of his claim should be made at that place to the representative; it would be sufficient, however or wherever made, if it reached him. (*Gansvoort v. Nelson*, 6 Hill, 389.) The creditor alone has a right to complain that information of the residence or place of business of the representative was not given him by the notice that might defeat his claims, or at least throw on him all the burden of the costs of an obstinate litigation. Much mischief might result to creditors from allowing an executor to select a place to exhibit claims to him, where there is no obligation upon him to be found and no motive to be present. In this case the place specified was declared to be the office of a counsel, and neither the place of business nor residence of the executor. There was no evidence that he could have been found there any time within the six months, except accidentally. The same statute deprives a claimant, who does not exhibit his claim within six months from the first publication of such notice, no matter how long time was given by it, of any right, to the extent of assets distributed by the representative, for debts of inferior degree, or to the next of kin or legatees, and makes such publication and distribution a bar. (2 R. S., 89, § 39.) Such stringent consequences require the executor to bring his notice clearly within the statute, and he has not done so in this case. (*Jenkins v. Wild*, 14 Wend., 545; *Argall v. Smith*, 3 Den., 437.) The meaning of the words "place of carrying on business," as used in two English statutes, (9 & 10 Vict., c. 95; 15 & 16 Vict., c. 54, § 4.) has been explained in three leading cases. (*Minor v. Lond. & N. W. Railway Co.*, 1 Com. Bench, [N. S.,] 1 J. Scott, [N. S.,] 331; *Shiels v. Gr. North'n Railway Co.*, 30 Law Jour., [N. S.,] Q. B., 332; *Corbett v. Gen. Steam Navig. Co.*, 4 Hurlst. & Norm., 482.) It was held in those cases that the office of an agent to receive parcels for a railway company, was not their place of carrying on business, for the purpose of being served with process, or to affect a question of costs. In the last case, MARTIN, J., observes that "the agents

Murray v. Smith.

"were not the servants of the defendants; there is nothing "whatever to show any relation of master and servant "between them." So in this case, there was nothing to show that Mr. Grim was a mere servant, so as to make his office that of the defendant. In the case of *Belknap v. Hasbrouck*, (13 Abbots' Pr., 418, n,) where a party transacted business was held not to be necessarily a place of business.

There is undoubtedly great room for questioning the reasonableness of the decision in *Dolbeer v. Casey*, [*ubi sup.*] The statute would seem to impose on the executor, the duty of publishing in one county paper, and on the Surrogate, of deciding what other paper, whether in the county or not, was most likely to convey information to creditors. It appeared to contemplate two at least; but I prefer resting on the insufficiency of the notice. The plea in this case sets up a publication in two newspapers, and a distribution of the estate as a bar. If *Dolbeer v. Casey*, be law, one was equally good if selected by the Surrogate.

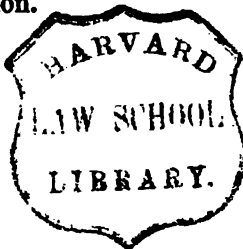
The same question as to notice, was evidently before this Court on the former application for costs, after the fourth trial, as appears by the order made, which recites that it was made among other things, upon a copy of the Surrogate's order and proof of publication, and because it appeared to the Court "that the demand on which this "action was founded, was *duly* presented; that the executor refused to refer the same pursuant to the statute, and "that the payment of the same was unreasonably resisted." The points of counsel used on such motion, presented the same question. Whether the Court held notice in one newspaper insufficient, the notice defective, or the foreclosure suit to be notice of the claim, or that the defendant, the executor, had waived the effect of the publication or misled the plaintiff, does not appear. They evidently decided on the same facts as are now before the Court, that the demand was duly presented. It would hardly be proper, even were I of a different opinion from the learned Judges who made that decision to depart from its authority

Murray v. Smith.

at Special Term, not as *res judicata*, but as a decision on the same facts.

There is also great room for holding the plaintiff entitled to costs, against the estate represented by the defendant under the Code of Procedure. (§ 317.) The provision of the Revised Statutes already referred to, (2 R. S., 90, § 41,) prohibits costs in suits against executors, whether to be levied of their property or that of the party represented, unless in the cases therein prescribed; in other words, it exempts both the executors personally, and the estate represented by them from costs. The section of the Code referred to, (§ 317,) makes a general rule by which representative parties are put on the same footing as to costs, as parties defending in their own right, except that such costs are to be paid out of the estate represented. It, however, enables the Court to charge such a representative personally, when guilty of mismanagement or bad faith. This is immediately followed by an exception, preventing costs from being recovered against executors, (without mentioning in suits against them,) where they are exempt by the provision of the Revised Statutes already cited. This is evidently intended to be a personal exemption, and not a relief of the estate represented, and qualified the immediately preceding provision allowing costs personally. The whole section established a fairer rule, to wit: That the estate to be benefited by a defense, successful, should be chargeable with the expense if it fail.

The motion must be granted, with ten dollars costs, to be costs in the action.



INDEX.



A.

ACCORD AND SATISFACTION.

1. The defendants having failed in business while indebted to the plaintiff, set apart certain claims as security for the debt, and on compromising them, receiving in part cash and in part a promissory note, wrote to him that they had done so, and remitting the cash, and saying that these "must be received in full of your debt. * * * You will please send a proper discharge." The plaintiff replied, acknowledging the receipt of the remittance, and saying, "I desire this to serve you as a receipt until you forward me the balance and such releases as you desire me to execute."

Held, That this was not an accord and satisfaction, and was no defense to plaintiff's action to recover the balance. *Geary v. Page et al.*, 290.

ACTION.

1. The Mayor of the City of New York, claiming, but without right, to be at the head of the police of the city, and having under his control a large body of men organized for that purpose, and known as the Municipal Police, was informed that the Metropolitan Police, which was then the legal police force of the city, were about to eject the Street Commissioner of the city from his office in the City Hall, violently and without process of law. He accordingly called together the Municipal Police, and while they were guarding the building, a Coroner, having an order for

the arrest of the Mayor, came to the City Hall to execute it, accompanied by a number of the Metropolitan Police, as a *posse comitatus*, of which the plaintiff was one. Their attempt to enter for the purpose of arresting the Mayor was resisted by the Municipal Police, and in the fray the plaintiff was injured.

Held, 1. That, although the Municipal Police, as an organized police force, was an illegal organization, and the Mayor had abused his authority in keeping it on foot, yet that such assemblage of the men, if solely for the purpose of resisting a forcible expulsion of the Street Commissioner from his office, assuming, as the charge did, that "the Mayor, in his discretion, was authorized as chief magistrate of the city, to interpose by force, if necessary, to prevent it," was not, necessarily, as matter of law, an unlawful assembly. The Mayor, being charged with the duty of causing laws for the preservation of the peace to be kept, is not confined to calling to his aid the lawful police for the purpose of resisting unauthorized violence, but may call on any citizens, and may by their aid resist the lawful police, if they are about to commit such wrong.

2. That if the assembly were claimed to be unlawful by reason of the circumstances under which it appeared, and the manner in which the persons composing it were conducting themselves, the question whether the circumstances and conduct were such as would alarm persons of reasonable firmness and courage, is one which belongs to the Jury to decide.

3. If the assembly was not an unlawful one, the Mayor is not liable in a civil action, for wrongs done by individual members of it, having no connection with the object for which it was convened, to which he was in no way privy, and of the purpose to commit which he had no knowledge or suspicion.
4. And if the Mayor did not know that the Coroner had previously come to serve the order of arrest, and took no measures to secure a free entrance to him, the mere fact that the Coroner, on coming with the *posse*, made proclamation at the entrance of the City Hall, of the object of his visit, and was resisted by the Municipal Police, would not make the Mayor liable for the plaintiff's injuries. *Slater v. Wood*, 15
2. An assignment under seal, expressed to be subject to the payment of a debt to a third person not a party to the instrument, where the assignee does not promise to pay, and the debt to be paid is not a lien on the thing assigned, does not entitle such third person to maintain an action therefor against the assignee. *Dingeldein v. The Third Avenue Railroad Company*,79
3. S., one of the defendants, held real and personal property in trust, to be used for the joint benefit of himself and the plaintiff, and a third person, in specified proportions, as copartners in a joint enterprise, and under an agreement that he was to make advances for carrying out the enterprise, and that all stocks or other securities than cash, which should be received, should remain undivided until a final settlement, and that he would not dispose of the property (other than money) without the consent of the others. He accordingly made large advances, and subsequently sold and conveyed all the property without the consent of the plaintiff, and received therefor stock of an incorporated company.
- Held*, that the plaintiff, by bringing an action, with full knowledge of these facts; in which he demanded a transfer of his share of the stock, and obtained an injunction against any disposal of it, pending the action, must be deemed, for the purposes of this suit, to have made his election of this remedy, and must be treated as if he had consented to the sale. *Cheeseman v. Sturges et al.*,246
4. Hence the proper relief in such action is that the plaintiff should pay his proportion of the advances and have a transfer of his share of the stock, and in default of his paying, that his share of the stock should be sold, and that he should pay the deficiency, if any.....*id*
5. The plaintiff is not entitled to a judgment that the whole stock be sold to pay the advances, and that the residue of the proceeds, or the deficiency, if any, be apportioned. The defendant may be allowed to retain his share of the stock, on being charged with his part of the advances.....*id*
6. After the commencement of this action, but before the trial, the corporation, the stock of which was in controversy, increased its capital stock, without, however, altering the nominal value of a share; and subsequently certificates of stock of the new issue were deposited in Court to await the result of the action.
- Held*, that if the plaintiff desired to make any claim against the defendant, based on his individual acts, in effecting such alteration in the stock, pending the action, he should have modified his pleadings accordingly. But by going to trial he must be deemed to pursue the stock as it existed after such increase.....*id*
7. The plaintiff having a fund in the hands of the defendants, his bankers, directed them to place the same to the credit of accounts, to be opened by them for the purpose, in the names of his children,

who were of tender years; but, after the defendants had done so, they continued to recognize the authority and directions of the plaintiff in the management of the fund, and it did not appear that he had been indebted to the children or had received any consideration upon the transfer of the credits, or that the children ever had notice thereof or received possession of the securities.

Held, That, notwithstanding such change in the accounts, the plaintiff could maintain an action in his own name, to recover from the defendants the balance due thereon. *Geary v. Page et al.*,290

8. The change in the accounts, under such circumstances, is neither a transfer of the fund or securities themselves, nor a gift *in presenti* nor *in futuro*. (*Per MONELL, J.*) *id.*

9. Where an action upon an official bond, *e. g.*, the bond of an administrator, is brought in the name of an individual plaintiff, and not in the name of the people, the judgment should not be for the amount of the penalty, but only for the amount of the damages and costs. *O'Connor v. Such et al.*,318

10. Where a pledgee, without demand or notice, transferred the bond and mortgage to a third person, for a sum sufficient to pay the debt, but grossly inadequate to the value of the bond and mortgage, and the latter canceled them: *Held*, that this was a conversion of them, and the pledgee was liable therefor, in an action in the nature of trover. *Campbell v. Parker*, 322

11. Such subsequent transfer of the bond and mortgage, having been not a sale, but a device to get the mortgage satisfied, and the plaintiff, the assignor, having tendered the debt due, and demanded a reassignment, it is immaterial whether the assignment be regarded as a pledge or a mortgage, for in either case a tender would destroy the pledgee's lien, and trover would lie for the refusal to deliver.*id.*

12. Where a vessel, alongside of a public pier in the City of New York, was burned without any fault of her owner, and sunk to the bottom near the mouth of the slip or basin, thereby obstructing the slip and bulkhead so as to prevent other vessels from coming in, and the defendants, insurance companies, which had insured undivided interests in the vessel, and had accepted an abandonment made by such insured owner, after the loss, employed a man of acknowledged skill and ability in the business of wrecking, who diligently prosecuted his efforts to raise it, until his method failed, and he left the work, when the defendants employed another man of equal skill and ability, who adopted another plan, and continued diligently working until stopped by cold weather, nearly a year after the vessel sunk, and in the following spring resumed the work, but was soon stopped when very near completing it, by the city authorities, who took exclusive possession and control, and who finally removed the wreck.

Held, 1. That the defendants were not liable to the owners of the pier, for its use in the prosecution of their work, or for damages in obstructing the basin meanwhile, since these facts did not show any negligence on their part.

2. That the defendants were not liable for any delays occurring after the city authorities took possession and control.

3. That the defendants were not liable for any injuries to the pier, done in the course of the work prosecuted by the contractors employed by them.

4. *Held further*, that the above facts appearing from all the plaintiffs' evidence at the trial, the plaintiffs were not entitled to have the cause submitted to the Jury; but it was proper to instruct the Jury to render a verdict for the defendants. (*BARBOUR and MONELL, J. J.*, dissented.) *Taylor et al. v. The Atlantic Mutual Insurance Company et al.*,369

13. In such a case, if the demand made on behalf of the plaintiffs to have the cause submitted to the Jury, does not suggest what question, if any, they should be called to pass on, it is too broad to sustain an exception on a refusal of the demand. (*Per* MONCRIEF, J.) *id.*
14. After an action to recover possession of specific personal property, and damages for its detention, has been commenced by the service of summons, a voluntary taking of the property, not from the defendants themselves, but by plaintiff's picking it up where he chanced to find it, does not extinguish the right of action. *Tracy v. The N. Y. & Harlem R. R. Co.*, 396
15. Where the only evidence as to the time of the commencement of the action, was the testimony of the plaintiff (a lawyer) that he commenced the action in the morning, and after he had put the papers in the Sheriff's hands for service, he found the goods lying in front of defendant's door, and took possession of them, there, about noon, or soon after noon, there being no evidence as to the time of serving the summons.
Held, That upon this evidence a verdict for the plaintiff should be sustained. *id.*
16. The following agreement, "For value received, I hereby guaranty to A., that the bond of," &c., "shall be of the value of," &c., "on," &c., "at which price and at which date I will purchase the same if offered to me," contains both a contract of guaranty, and a contract of purchase; and it gives A. his option to recover on the guaranty, retaining the bond, or to recover as on a sale of the bond upon delivering it up. (*BARBOUR J.*, dissented.) *DeLafield v. Holbrook et al.*, 446
17. *It seems*, that one to whom a fund was rightfully payable, cannot maintain an action against another, who, merely as agent for an adverse claimant, has collected the fund on behalf of the latter, in disregard of notice from the former not to do so. *Patrick et al. v. Metcalf et al.*, 483
18. A grantee of land, under a deed which is void by the statute, by reason of the land being held by a third person adversely to the grantor, cannot, upon his grantor's refusal to bring an action to recover the land or to allow such action to be brought in his name, maintain an action against the grantor and the adverse possessor, to have the latter adjudged to surrender possession to the grantor, and the title and possession adjudged to the plaintiff as against the grantor. *Lowber v. Kelly et al.*, 494
19. An action to recover the lands must be brought by the grantor, or in his name, by the grantee; but it cannot be so brought in his name without his consent, except since the statute of 1862. *id.*
20. Where an assignment for the benefit of creditors is made, by the members of a partnership, giving preference to the payment of the partnership debts, a creditor of the partnership cannot have the assignment set aside as void, because its provisions as to the subsequent payment of creditors of individual partners contain a direction calculated to hinder and delay them. No creditor but the one who is hindered, delayed or defrauded by the particular provision complained of, can avoid the instrument on that account. *Morrison et al. v. Atwell et al.*, 503
21. The Code of Procedure does not authorize the issue of an attachment, as a provisional remedy in an action of an equitable nature, where the amount which the plaintiffs may recover must be ascertained by an accounting, and the costs are in the discretion of the Court. *Guthon et al. v. Lindo*, 601
22. Thus, where, in an action for an injunction against the infringement of a trade-mark, and for damages, an attachment was issued,—

Held, That it was improvidently granted, and must be set aside. Such an action is not "an action for the recovery of money" within the meaning of section 227 of the Code.....*id.*

23. Where one of several creditors of an insolvent, who all had an equitable lien on goods and securities of his in the hands of his factors, issued an attachment, and served it upon the factors, and they, being also insolvent and desiring in good faith to have the fund applied equitably among their consignor's creditors, procured a suit to be brought against themselves and him for that purpose, by certain of such creditors other than the plaintiffs in the attachment, the suit being on behalf of all such of the creditors as should come in and contribute to its expenses.

Held, That the instituting of such suit and the appointment of a Receiver therein, could not be deemed collusive, and a reason for the interference of a Court of equity in behalf of the attachment creditors. *The Bank of Mutual Redemption v. Sturgis et al.*,.....660

24. Where, pending a suit brought by a creditor to reach the assets of his debtor, the latter is, by proceedings previously commenced in another Court, adjudged to be an habitual drunkard, and a committee is appointed of his estate, the Court in which the former suit is pending cannot properly proceed to final judgment. *Niblo v. Harrison et al.*,.....668

25. The plaintiff in such case, if he commenced his action in good faith, may be permitted to retain it; but his proceedings therein should be stayed, until the reformation of the defendant and the discharge of his committee, if such event should occur.....*id.*

26. If a Receiver has been appointed, he should be discharged, on paying the moneys in his hands into Court.....*id.*

27. *It seems*, that in an action in the nature of an action at law, the plaintiff in such case may be permitted to proceed to judgment, upon which he may apply to the Court having jurisdiction of the estate to require the committee to pay it.....*id.*

See COMMON CARRIER.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACTS.

AMENDMENT.

1. Where a complaint, as originally framed, set up three separate causes of action, but after the proofs were closed upon the trial, and the cause submitted, the Referee permitted an amendment thereto by adding a statement of a fourth cause of action, (demanding the same sums as were demanded in the original complaint,) in which it was alleged that the defendant having claimed damages for delay in the work, the parties, on an accounting of all these claims, including such last mentioned claim, found a specified balance due, which defendant promised to pay;

Held, 1. That the defendant, by amending his answer, and taking issue on such new cause of action, waived all objections to the propriety of permitting the amendment.

2. That the amendment was within the discretion of the Referee, and properly permitted. *Secor et al. v. Law*,163

2. Upon a complaint being amended in a material particular, the defendant's right to answer the amended complaint, by interposing any defense which he may possess, is absolute and unrestricted. *Harrriott et al. v. Wells et al.*,631

3. Thus, where, upon a trial of an action brought upon a contract, of which the plaintiffs, in their com-

plaint, alleged performance on their part, they failed to prove full performance, but gave evidence of a waiver of such performance by the defendants, and asked leave to amend their complaint accordingly, which was allowed on condition that the defendants be allowed to amend their answer so as to meet the plaintiffs' amendment, but the terms or nature of the amendment to be made by defendants were not prescribed.

Held, on defendants' motion after judgment, for leave to amend the answer by interposing the statute of limitations, that unless the plaintiffs elected to withdraw their motion to amend, the judgment should be vacated, and the defendants allowed to amend by interposing the statute of limitations or any other legal defense, without restriction. *id.*

See PRACTICE — *Amendment*.

ANSWER.

See PLEADINGS — *Answer*.

APPEAL.

See PRACTICE — *Appeal*.

APPEARANCE.

See PRACTICE — *Appearance*.

ARREST.

See PRACTICE — *Arrest*.

ASSIGNEE.

1. Where a factor, having possession of goods consigned to him, on which he has a lien for charges, makes a valid general assignment for the benefit of his creditors, and delivers such goods to his assignee, and they are subsequently seized by the Sheriff under process against the factor, the assignee is the proper person to whom the owner of the goods should tender the charges, in order to acquire a right to their possession. *Cook et al. v. Kelly*, 358

2. The owner having made such tender to the assignee, and having taken the goods from the Sheriff's possession, a subsequent retaking of them by the Sheriff is tortious, and makes him liable to an action for their conversion. *id.*

ASSIGNMENT.

1. An assignment under seal, expressed to be subject to the payment of a debt to a third person not a party to the instrument, where the assignee does not promise to pay, and the debt to be paid, is not a lien on the thing assigned, does not entitle such third person to maintain an action therefor against the assignee. *Dingeldein v. The Third Avenue Railroad Co.*, 79
2. Where a bond and mortgage are transferred by an assignment absolute on their face, but accompanied by a promissory note made by the assignor, which gives the assignee authority to sell the bond and mortgage, upon default of the assignor to pay his debt, the transaction is a pledge of the bond and mortgage, and not a mortgage or sale of them. *Campbell v. Parker*, 322
3. The assignee, in such a case, acquires only a special property in them, and is subject to all the duties and obligations of a pledgee. He has no right to sell them, without, at least, a demand upon the assignor for payment of the debt *id.*
4. Where an assignment for the benefit of creditors is made, by the members of a partnership, giving preference to the payment of the partnership debts, a creditor of the partnership cannot have the assignment set aside as void, because its provisions as to the subsequent payment of creditors of individual partners contain a direction calculated to hinder and delay them. No creditor but the one who is hindered, delayed or defrauded by the particular provision complained of, can avoid the instrument on

that account. *Morrison et al. v. Atwell et al.*,503

5. An assignment purporting to transfer real as well as personal property, for the benefit of creditors, is not rendered void by a direction to pay rents, taxes and assessments which may become due before the lands can be sold. If the assignment contemplates an immediate sale, such a provision may, in the absence of evidence to the contrary, be presumed to have been intended for the benefit of the creditors, by increasing the fund.
id.

6. Where copartners made an assignment which recited their copartnership, and their indebtedness as such, and assigned all the "property of every name and nature whatsoever of the said parties of the first part."

Held, That this was not an assignment of the individual property of the members of the partnership; and hence a direction in the assignment to pay rents, &c., due on lands, &c., assigned, did not apply to rents due from one partner individually for his dwelling house.....*id.*

7. An assignment of property in trust for the benefit of creditors, which contained the usual recital, that the assignors were "unable to pay their debts," and were desirous of "dividing their property equitably among their creditors," directed the assignees to pay to persons named in a schedule annexed, "the sums of money which are or may become due to them" from the assignors, * * * * and afterward, "to pay all the rest, residue and remainder of the creditors of said firm what may become due to them."

Held, 1. That the assignment was not fraudulent and void on the ground that under its provisions a preferred creditor could purchase other demands than those he held at the time of the assignment, and thus secure a preference for them also; for the provision giving a prefer-

ence to the specified creditors, for sums which "may become due to them," should be construed to apply to actual debts already owing to them, or contingent liabilities already incurred by them, at the time of the assignment, and thereafter to become payable.

2. Nor was the assignment void, as excluding from the benefit of the second clause creditors whose debts had become payable at the time of making the assignment. The direction to pay the rest of the creditors such sums as "may become due them," cannot be construed to exclude the payment of claims already due.

8. In construing an assignment of property in trust, for the benefit of creditors, as well as other written instruments, the general intention of the parties is to govern; and if its language can be satisfied by a construction that will support the instrument, a construction should not be given that will defeat it; and fraud is not to be presumed, but must be proved by the party alleging it. *Read et al. v. Worthington et al.*,617

9. An assignment for benefit of creditors is not void for securing and giving a preference to the payment of debts not yet due. Securing such a debt does not hinder or delay creditors, for the assignees may retain in their hands sufficient to meet it, and distribute the residue without delay.....*id.*

10. An allegation in the complaint that an assignment, which the plaintiffs seek to set aside, was made with intent to hinder, delay and defraud creditors, &c., is sufficiently put in issue by a denial that the assignment was made with intent to hinder and defraud creditors.
id.

11. Under the act of 1860, (Laws of 1860, 594.) an assignment for benefit of creditors is not void because of defects in the inventory

filed and the bond given by the assignee.....*id.*

12. A conveyance, by one member of a solvent firm, of his undivided interest in the real estate of the partnership, to a stranger, whether made upon a sale, or by way of payment of his individual debt, is valid as against the copartners; and they cannot maintain an action to have it set aside on the ground that it was made without their consent, and impairs the credit of the firm. *Treadwell et al. v. Williams et al.* 649

13. If creditors do not object, the purchaser takes a good title, and it does not lie with the other members of the firm to object; or, at least, to enable them to do so they must show that the partnership debts exceed the assets, and that there is need of the property in question to provide for the deficiency and equalize the interests of the partners.....*id.*

See ACTION, 7, 8.

ATTACHMENT.

1. A bailee of goods having a lien thereon for a sum far exceeding their value, who, when the goods are attached in his hands by a creditor of the bailor, certifies, in good faith, that he holds no goods for the benefit of the latter, does not thereby forfeit his lien. *The Bank of Mutual Redemption v. Sturgis et al.*,660

See DEBTOR AND CREDITOR, 4.

LIEN, 1.

PRACTICE—*Attachment.*

ATTORNEY.

1. An authority given to attorneys to sue the maker of a note does not empower them to release an indorser without satisfaction or the consent of their clients. *The East River Bank v. Kennedy*,543

See BANKING.

BILLS AND NOTES, 5.

PRINCIPAL AND AGENT.

B.

BANKING.

1. Where bankers and collecting agents receive from their correspondents engaged in the same business at another place, negotiable paper indorsed to them by the latter, the indorsement being expressed to be "for collection," and they do not credit their correspondents with it, but enter it in account as received for collection; and the circumstances and the course of dealing are such that they are not under any obligation to credit their correspondents with its amount until it be paid at maturity, and there is no understanding between them and their correspondents that remittances, or a delay to draw for cash balances, are to be influenced by the fact of holding paper sent for collection and not matured; they cannot, as against the owners who delivered the paper to their correspondents for collection, retain it on the ground of an unpaid balance due to them from such correspondents. Delay to draw for a cash balance, and the making of advances or remittances, after receiving the paper for collection, do not, under such circumstances, make them *bona fide* holders for value, so as to give them a superior title. *Hoffman et al. v. Miller et al.*,334
2. In such a case, testimony by the plaintiffs, the collecting agents, that in making remittances after receiving the bill in question, they looked to, and relied on, the unmatured paper in their hands for collection, is not entitled to any weight, if neither any agreement nor the course of dealing between them, authorized them so to rely, and their correspondents had no reason to suspect that any remittance made

to them was influenced by any such consideration.*id.*

3. In an action against bankers or collecting agents, to recover damages for their neglect to present a note intrusted to them for collection, or give notice of non-payment to the indorsers, the burden of proof is on the defendants to show the insolvency of the indorsers, if they rely on that fact as a defense. *Coghlan v. Dinmore*, 453

BILLS AND NOTES.

1. Under the act of 1857, (Sess. Laws, vol. 1, p. 839, § 3,) which provides that a notice of protest for an indorser residing in the same city or town where the note is payable, may be served by mailing it there, "directed to the indorser, at such city or town,"—a notice to an indorser residing in a large city, directed merely by his name and the name of the city, is not sufficient, where he has added to his indorsement the designation of his street and number. An indorser still has a right to make it a part of his contract that the notice shall be sent to a particular place; and where he designates a specific address within the city, a notice sent by mail must be addressed accordingly. *Bartlett et al. v. Robinson*, 305
2. One who receives a note, indorsed in the name of a partnership, knowing at the time that the indorsement was not given for a partnership debt or in the partnership business, but was written by one member of the firm, in a matter not relating to the firm's business, but on the contrary for the accommodation of another person, cannot recover thereon against the other members of the firm. *Fielden et al. v. Lahens et al.*, 436
3. In such an action it appeared that before the maturity of the note, the maker, who was indebted to the indorsers, paid them a part of the amount of the note, upon their promise to pay the note at maturity and give him further credit, and this transaction was unknown to the other parties.
Held, 1. That this payment was not available as a defense, *pro tanto*, in favor of the collecting agents, it not being a payment for the use or benefit of the holder of the note.
2. That the payment and promise having been unknown to the holder of the note until after the commencement of his action against the collecting agents, such facts did not amount to a waiver, on the part of the indorsers, of demand and notice of non-payment, which would exonerate the defendant from any consequences of their neglect to make such demand and give such notice. *Coghlan v. Dinmore*, 453
4. *It seems*, that an indorser of a note, who, being informed by the maker that he will be unable to pay the note, receives from him, without the holder's knowledge, a part of the amount of the note, promising to pay the note at maturity and give the maker further time, does not thereby waive demand and notice of non-payment.*id.*
5. The indorser of a promissory note which was past due, induced the holders of it to sue the maker; and, pending the action, and with the assent of the indorser, the plaintiffs' attorneys received from the maker a part payment and his note for the residue, upon a written stipulation that proceedings should be stayed, but if the new note should be unpaid at maturity judgment should be entered in the action against him; and they thereupon surrendered the original note, but nothing was said about releasing the indorser.
Held, In an action brought by the same plaintiffs against such indorser, that the surrender of the original note being explained by the plaintiffs' attorney as having been

inadvertently made, these facts did not constitute any agreement to discharge the indorser. *The East River Bank v. Kennedy*,.....543

6. Upon such evidence it was error to leave it to the Jury as a question of fact whether an agreement to discharge the indorser was made. *id.*
7. Where P. being asked by T. to discount an accommodation note, replied he had no money, and being asked to procure it to be discounted, took it, indorsed it, and procured the plaintiffs to discount it for him, at lawful interest, and the plaintiffs credited him with the amount; but on his paying over the proceeds to T. he deducted a large percentage; *Held*, that these facts fully warranted the Jury in finding that there was no usury in the transaction between P. and T. *The Chatham Bank v. Betts*,...552

BROKER.

8. Where a stock broker, without disclosing his principal, or the fact that he acts as broker, contracts to purchase stock, and deposits with the other party to the contract, merely as security for its performance, money which he received from his principal for the purpose, such contracting party, not having parted with anything on the faith of the deposit, cannot, when sued by the principal to recover back the deposit, set off a debt due to him from the broker. (*BARBOUR, J.*, dissented.) *White v. Jaudon*, 415

BURDEN OF PROOF.

See CONTRACTS, 24.
DAMAGES, 2.

C.

CASES AFFIRMED OR QUESTIONED.

1. The former decision of this Court in *O'Rourke v. Hart*, (7 Bosw.,

511,) that upon the facts disclosed, the defendant was not liable, reaffirmed and followed. *O'Rourke v. Hart*,.....301

2. The cases of *Warner v. Lee*, (2 Seld., 144.) *Scott v. The Ocean Bank*, (5 Bosw., 192, 23 N. Y. R., 289,) and *The Bank of the Metropolis v. The New England Bank*, (1 How. U. S., 234,) examined, and the two former followed, distinguishing the latter. *Hoffman et al. v. Miller et al.*,.....334
3. The case of *Crooker v. Cloughly*, (2 Duer, 684,) examined and distinguished. *Purchase v. Bellows*, 642

CAUSE OF ACTION.

See ACTION.

CITY OF NEW YORK.

See NEW YORK, CITY OF.

CLAIM AND DELIVERY.

1. The provision of section 215, of the Code of Procedure, which requires the Sheriff taking personal property in proceedings of claim and delivery, to keep it in a secure place, does not require him to remove it from its place of deposit, unless it is unsafe there; and if that place be a vessel at a wharf, he is bound to see that it is properly moored, secured and fastened, against all ordinary perils of winds and waves, and, if necessary, protected against any storm or gale, after it arose, by every means within his reach, which a prudent man would use for the purpose, either by removing the vessel to another place or otherwise; but he is not bound to anticipate a storm of so unusual violence as not to have been reasonably expected. *Moore v. Westervelt*,.....558

2. Thus, where, in an action to recover the possession of a cargo of coal, from the master of a vessel lying at a pier in the port of New

York, the Sheriff took possession, and put a keeper in charge of the coal, with the consent of the master, and the vessel sunk at wharf during a violent storm;

Held, In an action to recover from the Sheriff the damages sustained by the coal, and the expense of raising, that it was only the duty of the Sheriff to take such steps to insure its safety, as a careful, prudent man of good sense and judgment, well acquainted with the condition of the vessel, and her location in regard to exposure to storms, and having all the power of the Sheriff in the matter, might reasonably have been expected to take, had the coal belonged to himself.....*id.*

3. In such action, where the Court properly instructed the Jury as to the Sheriff's duty,—

Held, That a request to charge that the Sheriff is responsible for the negligence of the master and crew, after he took possession, was not proper in form, and it was not error to refuse it.

Held, further, That the verdict for the defendant was not against the weight of evidence in this case, and that judgment thereon should be affirmed.....*id.*

COMMON CARRIER.

1. In an action against a carrier of passengers, to recover damages for a failure to carry the plaintiff within the appointed time, to the place for which he had taken passage, by reason whereof he did not perform his errand there, and was detained at expense, and to the injury of his business at home, he must produce some evidence that if he had arrived at the appointed time he might have done his errand and would have promptly returned, or that he could not, with due effort, accomplish his errand by reason of his delay in arriving. Nor can the plaintiff, in such action, recover his expenses and the damages to his business during a sojourn of

several days, without some proof as to the time when he first ascertained that he could not accomplish his errand, and might, therefore, return. *Benson v. The New Jersey Railroad and Transportation Co.*,.....412

2. The fact that his errand was to receive a loan of money, previously promised to him, and that, not receiving it, he was without money for the expenses of returning until he received it from home, is not enough to show a necessity for delaying his return, if he made no effort to borrow, and does not show that there was any difficulty in his doing so.....*id.*

CONTRACTS.

1. The plaintiffs agreed to deliver to the defendant a certain quantity of cement, to be packed in air tight oak barrels, and to be subject to inspection of the United States Government inspector, and to be delivered at New York or Rondout (on the Hudson) at specified prices, at a credit of thirty days from the time of delivery, plaintiffs reserving the right to pack it in hard wood barrels if the Government would receive it so; and the contract expressed that the cement was for the Pensacola Navy Yard.

Held, 1. That by the true construction of this contract, delivery and acceptance by defendant, at New York or Rondout, entitled the plaintiffs to payment thirty days thereafter, although the cement had not within that time been approved on inspection at Pensacola. Passing inspection was not a condition precedent to the right to demand payment.

2. That such right was, however, liable to be defeated by the rejection of the cement on inspection at Pensacola; and if so rejected before suit brought, the defendant might avail himself of it as a failure of the consideration of his contract, and would not be restricted to setting it up as a counterclaim.

3. That by accepting cement packed in barrels, which were neither oak nor air tight, the defendant waived the provision of the contract which required such barrels, but might, nevertheless, rely on the provision that it should pass inspection.
4. That to establish a defense as to any part of the cement which was rejected upon inspection, defendant must have notified the plaintiffs, not only of its rejection, but also that it was at their disposal or was subject to their orders, and must, in some manner, (adapted to its then situation,) have furnished them with the means of controlling it. Merely informing the plaintiffs that a part of it had been "rejected at Pensacola," (without saying how much,) "and that it lay there," is not enough.
5. That to establish a counterclaim for damages for such breach, defendant must prove his damages. Proof of mere rejection on inspection would entitle him at most to nominal damages; and this alone is not ground for reversing a judgment against him for the price. *DeLafield et al. v. Degrauw*,1
2. In such an action, evidence tending to show that the cement was rejected because injured by careless handling, on the part of the defendant, is admissible.*id.*
- See ASSIGNMENT.
EVIDENCE, 1, 2.
INSURANCE, 1, 2.
NEW TRIAL, 2.
PARTNERSHIP, 1, 2.
PLEDGE, 2.
3. An agreement by the plaintiffs with the master of a vessel which the defendant chartered, to pay demurrage for delay, cannot form the basis of a counterclaim by the defendant against the plaintiffs for demurrage paid by him.*id.*
4. Where an unincorporated railroad company, desiring to control the construction of a public sewer

under their track, procured the contract with the city for its construction, in the name of the plaintiff, one of their members, which required him to do it within a fixed time, and to remove obstructions from, and facilitate the preservation of the track; and then employed him to do the work, agreeing to pay him his expenses over the contract price, and an allowance for his services, and, it being understood that the time in which, by his contract, he was bound to complete it, was too short, he agreed with them to do it in the shortest possible time, and also in a manner consistent with their interests, and not to stop the running of the cars.

Held, That this agreement with the Company was not illegal as against public policy. *Dingeldein v. The Third Avenue R. R. Co.*,79

5. A corporation was subsequently created to operate the railroad, and the Company conveyed their property to the corporation. The grant was, in terms, subject to the payment the Company had agreed to make to the plaintiff, but contained no covenant to pay it; and the plaintiff went on with the work, with the knowledge of the corporation, and without objection on their part, and their Superintendent, with the knowledge of the President, gave directions as to keeping the track clear.

Held, That these facts did not make the corporation liable for the plaintiff's compensation. To charge them, there must be either an entire novation of the contract, to which the plaintiff, the corporation and the unincorporated company should be parties; or a new promise on the part of the corporation should be shown.*id.*

6. *It seems*, that illegality in a contract sued on, though shown by the testimony, cannot avail the defendant, unless it is alleged in the pleadings; and that an allegation in the answer that the contract was ille-

gal, coupled with an enumeration in the same paragraph, of specific grounds of illegality, does not entitle the defendant to prove any ground of illegality not so specified. *id.*

7. An agreement by which a person is to be paid a stipulated sum for giving testimony, on the condition that it leads to the termination of a suit favorable or satisfactory to the other contracting party, who is a party to such suit, is illegal and void. *Pollak v. Gregory et al.*, 116

8. Where parties to an action involving the question of the validity of a patent, entered into an agreement with one who was qualified to testify as an expert, by which the former paid the latter \$1,000; and, further, agreed to pay him \$2,000, upon the condition that the information possessed by him, or the testimony given by him, should enable them to succeed in the action; and, further, agreed to pay him his traveling expenses, and the usual per diem of an expert; he agreeing, in consideration of the premises, to "hold himself at all times in readiness to give his testimony, or to impart his information, as above, as an expert in said matters: "

Held, That the whole agreement was void; and that he could not recover even his fees as expert and his traveling expenses. (*ROBERTSON, J.*, dissented.) *id.*

9. The defendant and others who were associated in an enterprise of building certain steamships to fulfill a contract with the United States government for carrying the mail, entered into an agreement with each other whereby the defendant and R., C. and W., agreed to build such steam vessels, to conform to such government contract, under the direction and control of the defendant; such vessels when built to be held by the defendant, and R. and M., as trustees for the other associates. The hulls of two of

such vessels having been built, the defendant made a contract with the plaintiffs' firm for the steam engines, at a cost of \$300,000. This contract, which was tripartite, purported, in the body of it, to be made by the defendant and R., C. and W., with another person, who was not a party to the original agreement of the associates; but it was not signed by any one but the defendant. In making it and carrying it out, the plaintiffs' firm dealt only with the defendant. He made sundry payments upon the contract, partly by conveying land in which his associates had no interest, and partly by giving his individual notes, payable at a future day, without adding interest for the time, which he refused to include on account of alleged delay in the work, and of a claim to damages for which delay, he had given them written notice in his own name. Upon accounting with his associates, he charged them with the price of the land as a cash payment, and interest upon the notes he had given, from the day of giving them, and after adjusting his accounts with plaintiffs' firm, promised them to pay the balance.

Held, 1. That in an action for the balance due for the work under the contract, and extra work on the same vessels, such facts were evidence from which a Referee might infer that exclusive credit was given to the defendant, and if so, that an action would lie against him alone, without joining the other persons named with him in the instrument.

2. That even if this were not the case, he made himself liable on the contract by signing it alone; there being no proof that he intended not to be bound until the others signed.

3. That the evidence in the case being sufficient to sustain the finding by the Referee, that the defendant, having, on an accounting with his associates, been allowed the sum due the plaintiffs' firm, in consideration thereof assumed pay-

ment of the same to them, such finding would sustain the plaintiffs' action against him alone.

4. That, upon the evidence, the Referee being warranted in finding that the defendant, upon an accounting with the plaintiffs' firm, in relation to the contract with them and the work under it, had either waived all claim for damages on account of delay in the work, or had considered the advantages he obtained in the settlement equivalent to it; he might disregard such claim as being no longer available to reduce plaintiffs' claim.
Secor et al. v. Law, 163

10. *It seems*, that the defendant had not, merely as a joint owner of the hulls of the vessels, authority to bind his co-owners, by a contract for the conversion of them into steam vessels, by placing engines in them. *id.*

11. An agreement between the guardian of an infant and the person becoming surety in his official bond, that the latter shall hold the property of which the guardian is custodian, for his own indemnity, is void, because subversive of the objects of the appointment and security, and contrary to public policy. The guardian cannot pledge the property of his ward as security to his own surety. *Poultney v. Randall*, 232

12. Hence it is no defense, in an action by the guardian, against one who has collected moneys of the estate and refuses to pay them over, to show that the defendant became the guardian's surety upon such an agreement, and that the guardian is insolvent, and to offer to pay the money into Court. *id.*

13. The words "for value received," in a contract, sufficiently express the consideration within the requirement of the statute of frauds. *Howard v. Holbrook et al.*, 237

14. Where a person employs different parties by distinct contracts, to

do, respectively, the carpenter work and the mason work of a building, neither contractor being a party to the other's contract, and the contract of one not referring to that of the other, and the work being such that the performance of the carpenter work is necessary to enable the mason to perform his work, if, by a delay on the part of the former the latter is prevented from making strict performance within the contract time, he does not thereby become liable to the employer as for a breach of his contract, nor forfeit his right to recover for what he has done. *Stewart et al. v. Keteltas*, 261

15. In such a case, where the masons brought their action to recover for the work, and the defense was, that they had not completed it by the first of February, which was the time fixed by the contract.

Held, That there was no error in charging the Jury that if there was a delay or interruption of the work of erecting the building, resulting from the omission of the carpenters to do what was essential to enable the plaintiffs to proceed with their work, and if such delay was such as to throw the completion of the work over the first of February, then the plaintiffs would be entitled to recover, being prevented from completing their contract in time, by the act of the defendant or his carpenters.

Held, further, That upon the evidence in this case the Jury were warranted in finding that the plaintiffs were prevented by the carpenters from completing the work in time. (ROBERTSON, J., dissented.) *id.*

16. After a written contract for the construction of a building had been made it was ascertained by the parties that certain work would be necessary, which, at the time of making the contract, was not anticipated, and the question which arose between them, as to who was to bear the expense of it, was settled by the employer agreeing to

- pay the contractors a specified sum for doing it, and relying on this promise they did it.
- Held*, That he was not afterwards at liberty to insist that the written contract required them to do it at their own expense. *id.*
17. Under a provision in a contract to do the mason work of a building, that payment is to be made "when all the works are completely finished, and certified by the architect to that effect," a certificate that the contractors "have completed the mason work to your building" is sufficient. *id.*
18. The common law rule that in an action on a joint contract, against several persons, the plaintiff cannot recover against either, without establishing that the contract sued upon is the joint contract of all, still applies in actions, which were commenced before the enactment of the Code of Procedure. *Fielden et al. v. Lahens et al.*, 436
19. The provision of section 274 of the Code of Procedure, altering this rule, does not affect actions commenced before the Code; and section 459 of the Code, as amended in 1851, which makes all its provisions apply to future "proceedings" in actions theretofore commenced, merely prescribes the forms to be observed, and does not modify or repeal any rule of law affecting a defendant's liability or a plaintiff's right to recover. *id.*
20. The following agreement "For value received, I hereby guaranty to A., that the bond of," &c., "shall be of the value of," &c., "on," &c., "at which price and at which date I will purchase the same if offered to me," contains both a contract of guaranty and a contract of purchase; and it gives A. his option to recover on the guaranty, retaining the bond, or to recover as on a sale of the bond upon delivering it up. (*BARBOUR, J. dissented.*) *Delafield v. Holbrook et al.*, 446
21. Under a covenant, in an executory contract, for the sale of a lot of land by the vendor, to erect upon an adjoining lot, along the boundary line between the two lots, a wall, and to grant and convey to the purchaser the right to use such wall in the erection of a house on the lot so agreed to be sold to him, and "for that purpose to insert the beams thereof into such wall, to the extent of four inches," and two chimney backs to the like extent, and to "keep and maintain such beams and chimney backs therein, so long as such wall should stand," such wall "to be a party wall between the two houses to be built" on such two lots, the contract containing also, in terms, a present grant of such easement in such wall to be built.
- Held*, That the purchaser did not acquire thereby a right to use such wall in any other way than that so specified; and that he was not entitled to prolong the lintel course of his front wall, across the boundary line of such two lots, so as to enter into the front wall of the vendor's building at the point or line where those walls, meeting, adjoined the party wall. *Fettireich v. Leamy*, 510
22. The Broadway Bank loaned money to C., for which they received from him a pledge of stocks as collateral security. They also discounted several notes for him, and received from him a draft on a distant place for collection. Before it was known whether the draft was paid or not, he applied to the president of the bank, saying that he must have the proceeds of the draft immediately or must suspend payment; and the president asking for collateral security, he answered, "The bank holds all my stocks, and they are security for all my discounts and this draft," to which the president replied, "If that is so the bank will put the proceeds of this draft to your credit," which was thereupon done.
- Held*, That this was a pledge *in presenti* of the stocks, as security

for all the discounts which had been made for C., as well as for the draft in question. (ROBERTSON, J., dissented.) *Van Blarcom et al. v. The Broadway Bank*,532

23. Tradesmen who sell goods to a wife upon her husband's account, after notice from him not to do so, cannot recover from him therefor, unless they show a subsequent promise by him to pay, or that the goods sold were necessary and suitable to her condition in life, and that she was not otherwise provided for by her husband. *Theriot et al. v. Bagiole*,578

24. If the husband has given such notice, the burden of proof is upon the plaintiffs, to show that the goods sold were necessary and not provided by the husband.*id.*

CONVERSION.

1. Where the pledgee of a bond and mortgage, without demand or notice, transferred the bond and mortgage to a third person, for a sum sufficient to pay the debt, but grossly inadequate to the value of the bond and mortgage, and the latter canceled them: *Held*, That this was a conversion of them, and the pledgee was liable, therefore, in an action in the nature of trover. *Campbell v. Parker*,322

2. Such subsequent transfer of the bond and mortgage, having been not a sale but a device to get the mortgage satisfied, and the plaintiff, the assignor, having tendered the debt due, and demanded a re-assignment, it is immaterial whether the assignment be regarded as a pledge or a mortgage, for in either case a tender would destroy the pledgee's lien, and trover would lie for the refusal to deliver. (*Per Bosworth, Ch. J.*)*id.*

3. The owner having made tender to the assignee, and having taken the goods from the Sheriff's possession, *Held*, That a subsequent retaking of

them by the Sheriff was tortious, and made him liable to an action for their conversion. *Cook v. Kelly*, 358

CORONER.

1. Under the Code of Procedure, (§§ 185, 419,) the Coroner may call to his aid the power of the county, in a proper case, in executing an order of arrest in an action in which the Sheriff is a party. *Slater v. Wood*,15

2. The mere fact that the officer had not, at the time of summoning the power of the county, a sufficient cause for summoning them, does not affect the duty of the persons summoned to aid him if, when they come together, resistance is offered to his executing the process, nor does it affect the consequent liability of those who make or cause such resistance, except that it may perhaps affect the question of damages.*id.*

See ACTION.

CORPORATION.

1. Where an unincorporated railroad company, desiring to control the construction of a public sewer under their track, procured the contract with the city for its construction, in the name of the plaintiff, one of their members, which required him to do it within a fixed time, and to remove obstructions from, and facilitate the preservation of, the track; and then employed him to do the work, agreeing to pay him his expenses over the contract price, and an allowance for his services, and, it being understood that the time in which, by his contract, he was bound to complete it, was too short, he agreed with them to do it in the shortest possible time, and also in a manner consistent with their interests, and not to stop the running of the cars.

Held, That this agreement with the Company was not illegal as against

public policy. *Dingeldein v. The Third Avenue Railroad Co.*,...79

A corporation was subsequently created to operate the railroad, and the Company conveyed their property to the corporation. The grant was, in terms, subject to the payment the Company had agreed to make to the plaintiff, but contained no covenant to pay it; and the plaintiff went on with the work, with the knowledge of the corporation, and without objection on their part, and their Superintendent, with the knowledge of the President, gave directions as to keeping the track clear.

Held, That these facts did not make the corporation liable for the plaintiff's compensation. To charge them, there must be either an entire novation of the contract, to which the plaintiff, the corporation and the unincorporated company should be parties; or a new promise on the part of the corporation should be shown.....*id.*

3. The possession, by the transfer agent of a corporation, of the transfer books of its stock, and his authority to allow them to be used, do not constitute the *indicia* of an authority to make representations as to the ownership of stock, so as to render the company liable for the falsity of such representations made by him. *Henning v. The New York and New Haven Railroad Company et al.*,.....283

4. Nor does mere permission, given by the agent, to enter upon such books a transfer of reputed stock, there being no new certificate given, amount to a representation by him that the person making the transfer was the owner of any genuine stock.....*id.*

See ACTION, 3-6.

NEW YORK, CITY OF.

COSTS.

1. Where, upon the trial of an action for the foreclosure of a mortgage
Bosw. — VOL. IX. 90

upon real property, the Judge directed judgment for the plaintiff, without, however, awarding costs, and ordered a reference, to ascertain the amount due the plaintiff and whether there were any prior liens, &c.; and upon the coming in of the report the plaintiff applied to another Judge, without notice to the other parties, and obtained final judgment awarding costs.

Held, That the judgment was unauthorized, and should be reversed on appeal. Whether the first decision was intended to be final or not, it did not warrant such a judgment. The Judge before whom the cause was tried, alone is competent to pass on the question of costs. *Chamberlain v. Dempsey*,.....540

See EXECUTORS AND ADMINISTRATORS, 5.

PRACTICE — costs.

RECEIVER, 6.

COUNTERCLAIM.

1. An agreement by the plaintiffs, with the master of a vessel which the defendant chartered, to pay demurrage for delay, cannot form the basis of a counterclaim by the defendant against the plaintiffs, for demurrage paid by him. *Delafield v. De Grauw*,.....1

See DAMAGES, 5.

LANDLORD AND TENANT, 1.

COVENANT.

1. Leases for a term not exceeding three years are not within the statute, (1 R. S., 738, § 140,) which declares that no covenant shall be implied in any conveyance of real estate. *Moffat v. Strong*, 57

2. The implied covenant for quiet enjoyment which arises upon such a lease is broken by an expulsion, by one having paramount title, without any judgment or decree. *id.*

3. The defendant was tenant of a lot of land and buildings thereon, under a lease from the plaintiff, for the

term of three years. The owner of the adjoining lot was, in fact, the owner of a strip of land within and along the side of the demised premises, and on which, in part, the well of the buildings rested; and he notified the defendant of the encroachment, and that he was about to excavate under the wall, and required him to remove the wall. The defendant gave written notice of this claim to the plaintiff, and required him to defend his rights as he might be advised, and notified him that he should hold him responsible for any damages sustained; but the plaintiff taking no measures to protect the wall or prevent its removal, and the excavation being commenced, the defendant, in view of the danger caused by the undermining of the wall, took it down, and rebuilt it on the line of the plaintiff's lot. In the plaintiff's action to recover the rent.

Held, 1. That these facts constituted such an eviction by paramount title, from a part of the demised premises, as to suspend a portion of the rent, and were available as a defense thereto.

2. That they were also a breach of the implied covenant for quiet enjoyment, and were available as grounds for a counterclaim to the rent. *id.*

D.

DAMAGES.

1. In computing the damages to be awarded to the plaintiff for an injury to his tenement and business by the defendant, a loss of anticipated profits, arising from an illegal business, cannot be included. *Kane v. Johnston*, 154

2. If it appears that the plaintiff was selling liquors, the burden is upon him to show that he had a license, if he would recover for such loss of profits in that business. *id.*

3. Where the plaintiff was a tenant having an unexpired term of only one month, and it appeared that she had no license; *Held*, that there was no presumption that she would have obtained a license before the expiration of the term. *id.*

4. In such case it is error for the Judge to refuse the defendant's request to charge the Jury, that the plaintiff is not entitled to recover for loss of profits from sale of liquor. *id.*

5. *It seems*, that a claim for unliquidated damages against the plaintiffs and others, in favor of the defendants and others, is not available by way of recoupment, counterclaim or set-off. *Scorr et al. v. Law*, 163

6. In an action to recover possession of specific personal property, and damages for its detention, it is proper that the Jury, on finding for the plaintiff, should assess the value of the property, as well as the damages, although the plaintiff has obtained a delivery before the trial (*BARBOUR, J.*, dissented.) *Tracy v. The New York and Harlem R. R. Co.*, 396

7. If the assessment of the value were not proper, the Court would not, before judgment, order a new trial on that ground. (*Per BOSWORTH, Ch. J.*) *id.*

8. In an action against a carrier of passengers, to recover damages for a failure to carry the plaintiff within the appointed time, to the place for which he had taken passage, by reason whereof he did not perform his errand there, and was detained at expense, and to the injury of his business at home, he must produce some evidence that if he had arrived at the appointed time he might have done his errand and would have promptly returned, or that he could not, with due effort, accomplish his errand by reason of his delay in arriving. Nor can the plaintiff, in such action, recover his expenses and the damages to his

business during a sojourn of several days, without some proof as to the time when he first ascertained that he could not accomplish his errand, and might, therefore, return. *Benson v. The New Jersey Railroad and Transportation Company*,.....412

9. The fact that his errand was to receive a loan of money, previously promised to him, and that, not receiving it, he was without money for the expenses of returning until he received it from home, is not enough to show a necessity for delaying his return, if he made no effort to borrow, and does not show that there was any difficulty in his doing so.id.

See JUDGMENT, 5.

TITLE TO REAL PROPERTY.

DEBTOR AND CREDITOR.

1. Where, in case of assets in controversy among creditors, a Receiver has been appointed in a suit brought by a part of the creditors, other creditors, prosecuting another suit, which seeks to appropriate and apply the assets, to the exclusion of the rights claimed by the former, cannot have a second Receiver appointed, unless the first Receiver, or the creditors he represents, are made parties to the latter action, and have opportunity to be heard on the question. *The Bank of Mutual Redemption v. Sturgis et al.*,...608
2. Thus, where the plaintiffs held bills drawn by R., upon, and accepted by S. & Co., his factors, who had a lien upon the general residue of goods in their hands for such acceptances and other advances, and, in actions on the bills against R., the plaintiffs issued attachments against his property, and levied on the goods in the hands of S. & Co., who certified to the Sheriff that they had no property of R.; and the plaintiffs, after obtaining judg-

ments, and their executions being returned unsatisfied, brought a creditor's suit for the benefit of themselves and all other creditors similarly situated, seeking to reach the goods and have them applied to pay their judgments;

Held, That as it appeared that other creditors, holding such bills, with an equal right to have the assets applied to their payment, had already had a Receiver appointed in an action on their own behalf, the Court should not appoint a second Receiver, at the instance of the present plaintiffs.id.

3. Even if S. & Co., should be deemed to have lost their lien as factors, by certifying that they had no goods of R., this cannot affect the right of other creditors, who, before the certificate was given, had acquired an equitable right to have the assets applied to pay acceptances held by them.id.

4. Where one of several creditors of an insolvent, who all had an equitable lien on goods and securities of his in the hands of his factors, issued an attachment, and served it upon the factors, and they, being also insolvent and desiring in good faith to have the fund applied equitably among their consignor's creditors, procured a suit to be brought against themselves and him for that purpose, by certain of such creditors other than the plaintiffs in the attachment, the suit being on behalf of all such of the creditors as should come in and contribute to its expenses,—

Held, That the instituting of such suit and the appointment of a Receiver therein, could not be deemed collusive, and a reason for the interference of a Court of equity in behalf of the attachment creditors. *The Bank of Mutual Redemption v. Sturgis et al.*,660

See ACCORD AND SATISFACTION.

ASSIGNMENT, 4.

DEFENSES.

1. A tenant being put out of possession, may defend an action for the rent, by proof that he was ousted by one having a title paramount to that of the landlord, although the ouster was not by virtue of a judgment, decree or any legal process; such tenant taking the burden of proof that he acted in good faith, and that such title was in fact paramount. *Moffat v. Strong*,57
2. It is not an unqualified rule that a tenant, put in possession by his lessor, may not deny the title of the latter. The rule is, that a tenant may not accept possession from a lessor, hold and enjoy under the demise, and then refuse to pay the rent, or refuse to yield the possession to his lessor at the termination of his lease, and justify such refusal in either case, by alleging or proving that the lessor, under whom he has had such enjoyment, had in fact no title. But eviction under title paramount is a defense, whether such title was in the evictor before the lease, or was acquired by him after the lease was executed.....*id.*
3. If such eviction or ouster is from a part of the demised premises, it entitles the tenant to an apportionment of the rent, and an abatement according to the relative value of the part from which he is evicted.....*id.*
4. *It seems*, that illegality in a contract sued on, though shown by the testimony, cannot avail the defendant, unless it is alleged in the pleadings; and that an allegation in the answer that the contract was illegal, coupled with an enumeration in the same paragraph, of specific grounds of illegality, does not entitle the defendant to prove any ground of illegality not so specified. *Dingeldein v. The Third Avenue R. R. Co.*,79
5. The defendants, *del credere* factors, on being applied to by their principals for advances, rendered an account of sales, showing sales at various dates, and specifying an average date at which the total balance would become due, and gave their acceptances for the amount, payable at that date; but before the acceptances matured they gave their principals notice that they could not pay them. *Held*, That the giving of the acceptances was no bar to an action by the principals against the factors, upon their liability as such, and that in such action the defendants were liable for interest from the day specified, without any further demand. *Blakely v. Jacobson*,140
6. *It seems*, that a claim for unliquidated damages against the plaintiffs and others, in favor of the defendants and others, is not available by way of recoupment, counterclaim, or set-off. *Secor et al. v. Law*, 163
7. The contracting party, in an action at law upon a mortgage of real estate, or, in an equitable action to foreclose the mortgage, a defendant who is the owner of the property, or has a valid lien upon it by mortgage or execution, is entitled to interpose the defense of usury as a matter of strict right. *Chamberlain v. Dempsey*,212
8. In a foreclosure suit, where the defense of usury is interposed by a grantee of the mortgagor, an admission at the trial, and the finding by the Court as a fact, that such grantee is the owner in fee of the premises, imports that the conveyance by which the grantee acquired title, was in hostility to the mortgage, and such a grantee may allege and prove, by way of defense, that the mortgage is usurious.....*id.*
9. Where a person employs different parties by distinct contracts, to do, respectively, the carpenter work and the mason work of a building, neither contractor being a party to the other's contract, and the contract of one not referring to that

of the other, and the work being such that the performance of the carpenter work is necessary to enable the mason to perform his work, if, by a delay on the part of the former the latter is prevented from making strict performance within the contract time, he does not thereby become liable to the employer as for a breach of his contract, nor forfeit his right to recover for what he has done. *Stewart et al. v. Keteltas*,.....261

10. In such a case, where the masons brought their action to recover for the work, and the defense was, that they had not completed it by the first of February, which was the time fixed by the contract.

Held, That there was no error in charging the Jury that if there was a delay or interruption of the work of erecting the building, resulting from the omission of the carpenters to do what was essential to enable the plaintiffs to proceed with their work, and if such delay was such as to throw the completion of the work over the first of February, then the plaintiffs would be entitled to recover, being prevented from completing their contract in time, by the act of the defendant or his carpenters.

Held, further, That upon the evidence in this case the Jury were warranted in finding that the plaintiffs were prevented by the carpenters from completing the work in time. (ROBERTSON, J., dissented.).....*id.*

11. The defendants having failed in business while indebted to the plaintiff, set apart certain claims as security for the debt, and on compromising them, receiving in part cash and in part a promissory note, wrote to him that they had done so, and remitting the cash, and saying that these "must be received in full of your debt. * * * * You will please send a proper discharge." The plaintiff replied, acknowledging the receipt of the remittance, and saying, "I desire this to serve you as a receipt until

you forward me the balance and such releases as you desire me to execute."

Held, That this was not an accord and satisfaction, and was no defense to plaintiff's action to recover the balance. *Geary v. Page et al.*,...290

12. After an action to recover possession of specific personal property, and damages for its detention, has been commenced by the service of summons, a voluntary taking of the property, not from the defendants themselves, but by plaintiff's picking it up where he chanced to find it, does not extinguish the right of action. *Tracy v. The New York and Harlem Railroad Company*,.....396

13. In an action brought to enjoin the defendants from infringing plaintiffs' trade-mark, an answer, alleging that the defendants had sold only a very small and specified quantity of merchandise bearing the label complained of, and that the same was sold to the plaintiffs' agent at their request, and that the use of the label was accidental, without intent to defraud plaintiffs or imitate their label, and did not represent the article to be plaintiffs', is not frivolous. *Guilhon et al. v. Lindo*,.....605

See CONTRACTS, 1, 12.

LANDLORD AND TENANT, 4.

DEPOSITION.

1. A deposition is not to be excluded on the ground that the witness was incompetent, by reason of interest, at the time when it was taken, if his oral testimony would be competent by law at the time of the trial, notwithstanding the existence then of the same interest. *Fielden et al. v. Lahens et al.*,...463
2. The Court will not entertain a motion to suppress answers in a deposition taken on commission, upon an objection going, not to the

regularity of the execution of the commission, but merely to the admissibility of the witnesses' evidence. *Howard v. The Orient Mutual Insurance Company*,...645

3. In interrogatories to take the deposition of a witness upon commission, a cross-interrogatory, asking if a log-book was kept, on a certain vessel, and if so, whether it did not contain a statement upon a subject in question, and requiring the witness to produce the log-book, is not sufficient to require the book or a copy of it, to be annexed to the deposition. The witness should be required to annex a copy, if it be desired to make it an exhibit.....*id.*

DIVORCE.

1. Until after an order has been made by a Court by whom a judgment of absolute divorce has been rendered in favor of a wife against a husband, requiring the latter to give a bond with surety, for the payment of an allowance awarded to such wife, in such judgment, and the failure of such husband and his surety to fulfill the condition, such Court is not authorized by the provisions of the Revised Statutes, (2 R. S., § 60,) to sequester the estate of such husband, appoint a Receiver thereof, and apply it to the payment of such allowance. *Forrest v. Forrest*,686
2. Where security has been given by such husband in such case, by order of such Court, for the payment of such allowance, it must first be resorted to and exhausted before his estate will be sequestered. *id.*
3. If such security consist of a mortgage, previously belonging to such husband, and assigned by him to a trustee to secure the payment of such allowance, and the latter has become in arrear by reason of the collection by the husband of the interest on such mortgage, in consequence of a failure to notify the

mortgagor of such assignment, and the proceeds of such mortgage on a sale, would probably after payment thereon, of such arrears, be sufficient if invested at six per cent interest, to yield enough to pay such allowance, the Court, on the wife's application, will order such trustee to sell such mortgage, pay such arrears from the proceeds of such sale, and invest the residue as security for the payment of such allowance, and apply the interest as received, to such payment....*id.*

E.

ELECTION OF REMEDIES.

See ACTION, 3-6.
CONTRACTS, 20.

ERROR.

1. It is error to permit a witness who knows nothing of the services in question, except as instructed by the evidence he has heard at the trial, to testify what, upon the evidence, the services are worth. *Scott v. Lilienthal*,224
2. In an action against a railroad company, where they rely upon a rule established by them for the regulation of business, which the Court instruct a Jury is a legal and valid rule, the rejection of evidence that the uniform usage of other companies is the same, is not error. *Tracy v. The New York and Harlem R. R. Co.*,396
3. The Court will not reverse a judgment because the Referees, before whom the cause was tried, excluded an offer of further evidence on the part of the plaintiffs, made after the plaintiffs had rested and a nonsuit had been directed, unless the offer of such evidence showed at least the counsel's belief that the evidence, if admitted, would aid the plaintiffs. *Fielden et al v. Lahens et al*,.....436

See **CONTRACTS**, 15.
DAMAGES, 4.
NEW TRIAL, 2.
TITLE TO REAL PROPERTY.

ESCAPE.

1. In a suit against the sheriff for the escape of a debtor, in his custody, by virtue of a *ca. sa.*, and where the complaint is of the nature of a declaration in an action of debt, under 2 Rev. Stat., 437, § 63, the defendant cannot show the insolvency of the debtor in mitigation of damages; and hence an answer alleging only such insolvency is bad on demurrer. *McCreery v. Willett*, 600

ESTOPPEL.

- I. After a written contract for the construction of a building had been made, it was ascertained by the parties that certain work would be necessary, which, at the time of making the contract, was not anticipated, and the question which arose between them, as to who was to bear the expense of it, was settled by the employer agreeing to pay the contractors a specified sum for doing it, and relying on this promise they did it.
Held, That he was not afterwards at liberty to insist that the written contract required them to do it at their own expense. *Stewart et al. v. Keteltas*,261

EVICITION.

1. The defendant was tenant of a lot of land and buildings thereon, under a lease from the plaintiff, for the term of three years. The owner of the adjoining lot was, in fact, the owner of a strip of land within and along the side of the demised premises, and on which, in part, the wall of the buildings rested; and he notified the defendant of the encroachment, and that he was about to excavate under the wall, and required him to remove the wall. The defendant gave written notice of this claim to

the plaintiff, and required him to defend his rights as he might be advised, and notified him that he should hold him responsible for any damages sustained; but the plaintiff, taking no measures to protect the wall or prevent its removal, and the excavation being commenced, the defendant in view of the danger caused by the undermining of the wall, took it down, and rebuilt it on the line of the plaintiff's lot. In the plaintiff's action to recover the rent:

Held, 1. That these facts constituted such an eviction by paramount title, from a part of the demised premises, as to suspend a portion of the rent, and were available as a defense thereto.

2. That they were also a breach of the implied covenant for quiet enjoyment, and were available as grounds for a counterclaim to the rent. *Moffat v. Strong*,57

See **LANDLORD AND TENANT**, 1-3.

EVIDENCE.

1. Evidence of a conversation between the parties at the time of delivery of cement in barrels as to the quality of the barrels, and evidence that the Government gave plaintiffs leave to use hard wood barrels instead of oak, may be competent; but evidence of the conversation of the parties at or before executing the contract, as to where they intended the inspection to be had, and what they meant by delivery, is not competent. *Delafield v. De Grauw*,1
2. *Held, further*, that a general offer by defendant to give evidence of money paid by him to remove the worthless part of the rejected cement which was required by his contract with the Government before he could be paid for any of that which was received, when no proof had been given that it was worthless, nor any evidence as to how it was disposed of, nor any proof of an offer to return it, was properly refused.....id.

3. An agreement by the plaintiffs with the master of a vessel which the defendant chartered, to pay demurrage for delay, cannot form the basis of a counterclaim by the defendant against the plaintiffs for such demurrage paid by him....*id.*
4. Were it otherwise, it would not be admissible to inquire of a witness what the master demanded; but the inquiry should be, how long was the vessel detained and what was the rate or amount of the demurrage?.....*id.*
5. At the close of the trial, it is in the discretion of a Referee, whether he will allow depositions to be read as to matters which should be proved by a plaintiff or defendant before he rests, and his refusal to allow it is not matter of exception.....*id.*
6. Moreover, where such depositions are not embodied in the case on appeal, the Court cannot review the Referee's discretion in this respect.....*id.*
7. In computing the damages to be awarded to the plaintiff for an injury to his tenement and business by the defendant, a loss of anticipated profits arising from an illegal business cannot be included. *Kane v. Johnston*,.....154
8. If it appears that the plaintiff was selling liquors, the burden is upon him to show that he had a license, if he would recover for such loss of profits in that business.....*id.*
9. Where the plaintiff was a tenant having an unexpired term of only one month, and it appeared that she had no license; *Held*, that there was no presumption that she would have obtained a license before the expiration of the term.....*id.*
10. In such case it is error for the Judge to refuse the defendant's request to charge the Jury, that the plaintiff is not entitled to recover for loss of profits from sale of liquor.....*id.*
11. Where the Receiver of a dissolved corporation brought an action against the executors of the deceased president and treasurer, to recover from his estate the amount of moneys of the corporation which he had loaned to stockholders, without authority and contrary to the statute, the defense interposed was that the trustees of the corporation had ratified the act. The Referee before whom the cause was tried reported substantially the facts alleged in the complaint, and, as a conclusion of law, found that the plaintiff was entitled to recover, but did not expressly negative the alleged ratification. The only evidence of any ratification was that in an annual report of the company, a part of the sum was mentioned as loaned to certain stockholders.
Held, That the judgment for the plaintiff was correct. *Clarke v. Acosta et al.*,.....158
12. A finding of the Referee contained in the case, as settled, that the deceased, after making the loan, informed the trustees and stockholders that he had made it, there being no other evidence of his giving such information than the annual report above mentioned, does not conflict with the presumption arising from his reporting in favor of plaintiff, that he found against the defendants on the question of ratification.....*id.*
13. The defendant and others who were associated in an enterprise of building certain steamships to fulfill a contract with the United States Government for carrying the mail, entered into an agreement with each other whereby the defendant and R. C. and W., agreed to build such steam vessels, to conform to such Government contract, under the direction and control of the defendant; such vessels when built to be held by the defendant, and R. and M., as trustees for the other associates. The hulls of two of such vessels having been built, the defendant made a contract with the



plaintiffs' firm for the steam engines, at a cost of \$300,000. This contract, which was tripartite, purported, in the body of it, to be made by the defendant and R., C. and W., with another person, who was not a party to the original agreement of the associates; but it was not signed by any one but the defendant. In making it and carrying it out, the plaintiffs' firm dealt only with the defendant. He made sundry payments upon the contract, partly by conveying land in which his associates had no interest, and partly by giving his individual notes, payable at a future day, without adding interest for the time, which he refused to include on account of alleged delay in the work, and of a claim to damages for which delay, he had given them written notice in his own name. Upon accounting with his associates, he charged them with the price of the land as a cash payment, and interest upon the notes he had given, from the day of giving them, and after adjusting his accounts with plaintiffs' firm, promised them to pay the balance.

Held, 1. That in an action for the balance due for the work under the contract, and extra work on the same vessels, such facts were evidence from which a Referee might infer that exclusive credit was given to the defendant, and if so, that an action would lie against him alone, without joining the other persons named with him in the instrument.

2. That even if this were not the case, he made himself liable on the contract by signing it alone; there being no proof that he intended not to be bound until the others signed.

3. That the evidence in the case being sufficient to sustain the finding by the Referee, that the defendant, having, on an accounting with his associates, been allowed the sum due the plaintiffs' firm, in consideration thereof assumed payment of the same to them, such finding would sustain the plaintiffs' action against him alone.

4. That upon the evidence, the Referee being warranted in finding that the defendant, upon an accounting with the plaintiffs' firm, in relation to the contract with them and the work under it, had either waived all claim for damages on account of delay in the work, or had considered the advantages he obtained in the settlement equivalent to it; he might disregard such claim as being no longer available to reduce plaintiffs' claim. *Scor et al. v. Lau*, .163

14. It appearing on the trial of the cause, that at the execution of the contract sued on, the plaintiffs gave the defendant a receipt for \$30,000, as paid thereon, but such sum had not been charged by the defendant in his accounts with his associates by which he settled with them.

Held, 1. That evidence that the money had not actually been paid was admissible.

2. That evidence of the failure of the defendant to communicate to his associates the fact that he had obtained credit by giving his notes without interest, or had conveyed land instead of paying money, at the time of settling his accounts with them, was admissible as a circumstance to show that the defendant deemed the contract entirely his own.*id.*

15. The Judge, before whom this action was tried at Special Term, having found, as conclusions of fact, that the plaintiffs, in Nov., 1856, "compounded from coconut oil and other ingredients, a mixture to be used as a hair wash, for which they advised, as a trade-mark, * * * the name or word Cocaine; that they published the same very extensively, with notice that they had adopted the said name or title as their trade-mark;" and that the defendants, in Nov., 1858, "commenced the preparation and sale of a similar compound in bottles, * * * and with labels under the name and title of Cocaine;" and further, (as the fifth finding), "that the defendants well knowing that

the name, word or title of 'Cocaine' was, and for a considerable time had been the trade-mark of the plaintiffs, with the wrongful intention of inducing the public to believe that the compound sold by themselves under the name, word or title of 'Cocaine,' was that of the plaintiffs, and with the wrongful intention of securing to themselves the benefit of the skill, labor and expense of the plaintiffs, have so closely imitated and used the aforesaid trade-mark of the plaintiffs as to deceive the public and to injure and endamage the plaintiffs; that the word, name, title or device 'Cocaine,' is a spurious and unlawful imitation by the defendants of the word, name, title or device 'Cocaine,' the aforesaid trade-mark of the plaintiffs." It was held that the plaintiffs were entitled to a judgment enjoining the defendants from manufacturing, using, selling or in any manner disposing of a compound or preparation with the name, word or title of "Cocaine," printed or stamped upon the bottles, labels, wrappers, covers or packages thereof.

The evidence on which the facts were found, is stated in the opinions delivered; — ROBERTSON, J., dissenting from the conclusion that it was sufficient to sustain them. *Burnett et al. v. Phalon*,192

16. In an action to recover compensation for services, alleged in the complaint to have been performed, upon a promise to pay therefor at an agreed rate of compensation, if the proof is that they were performed on a promise to pay what they were reasonably worth, the variance is immaterial, and the defendant not being misled thereby, the Court may allow an immediate amendment, without costs. *Scott v. Likienthal*,224

17. In proving a tender, under an agreement by defendant's testator, that he would purchase a bond if offered to him on a specified day, the witness testified that on that

day he presented it at testator's place of business, he not being there and being represented to be out of town, that at a subsequent day the witness called there, and found a person who answered to the name, and acknowledged the agreement to be his, but said he could not redeem the bond, and who, on being told that the witness had been there twice before, said that he had been out of town. There was no evidence that the testator was not out of town, or that he was out of town and within the State. *Held*, that the testimony was *prima facie* sufficient to excuse a personal tender on the day, and was sufficient to go to the Jury on the question of identity. ROBERTSON, J., dissented. *Howard v. Holbrook et al.*,237

18. Where the contract sufficiently expresses the consideration on its face, a new trial will not be granted for error in admitting evidence of the actual consideration in support of the validity of the contract. *id*

19. In an action to recover for goods sold, the defense being that the sale was not to the defendant, but to one L., it appeared that the plaintiffs, deeming L. to be irresponsible, had refused to sell to him on credit, without security, and he, accordingly, brought the defendant, to them as his security, whereupon the defendant bought the goods for L., and they were charged to the defendant. At the trial, a witness to the transaction was asked to state whether he knew, when L. came there, anything concerning his responsibility, and if so, whether he, the witness, made any communication on that subject to the plaintiff.

Held, That it was not an objection to this question that the defendant was not shown to have been present. The communication, if any, was one proper to be privately made, and the presence of defendant is immaterial. (BARBOUR, J., dissented.) *Bronner v. Fraumithal*,350

20. *It seems*, that the question is proper, on the ground that evidence having been given by defendant, tending to show that plaintiffs were willing to sell to L., it was competent for them to show that they did not believe him responsible. *id.*

21. Where one witness, being asked where was a note he had indorsed, and which had been delivered back to him, testified: "I don't know; I expect it is destroyed; after I got it back I tore my name off; I have not got it," and another witness testified that he once saw the note at a banking house: *Held*, that parol evidence as to what the indorsement was, was not admissible, without further proof that the note was destroyed or lost. *id.*

22. A witness having testified that a sale of goods by plaintiffs on credit, was to him, and not to defendant, and that his credit was ample at the time of sale; was cross-examined as to judgments against him, and, without objection being made, answered as to them in detail, and identified all the judgment rolls.

Held, That this made it proper to admit the judgment rolls in evidence, both as contradicting the witness and as tending to disprove that the sale was to him. *id.*

23. The testimony of a witness, that himself and partner, having a special property in certain goods, executed a chattel mortgage thereon, which he thought was not delivered, without proof of delivery of the goods or the filing of the mortgage, is not evidence of a mortgage which will affect the rights of the general owner of the goods or of the mortgagor's assignee. *Cook et al. v. Kelly*, 358

24. In an action against a railroad company, where they rely upon a rule established by them for the regulation of business, which the Court instruct a Jury is a legal and valid rule, the rejection of evidence that the uniform usage of other companies is the same, is not error.

Tracy v. The New York & Harlem R. R. Co., 396

25. Where the only evidence as to the time of the commencement of the action, was the testimony of the plaintiff, (a lawyer,) that he commenced the action in the morning, and after he had put the papers in the Sheriff's hands for service, he found the goods lying in front of defendant's door, and took possession of them, there, about noon, or soon after noon; there being no evidence as to the time of serving the summons.

Held, That upon this evidence a verdict for the plaintiff should be sustained. *id.*

26. Where a building was originally constructed, and several times used, for the purposes of an exhibition of industry, or fair; and the defendants, knowing its use, had several times insured its owners or lessees in respect to it, and the plaintiffs, subsequently becoming its owners, procured the defendants to insure them in respect to it.

Held, That the plaintiffs had a right, after obtaining such insurance, to occupy and use the building for the same purposes; but, that, if it was used otherwise than as a mere place of exhibition, or was so occupied or used as to render the hazard greater at the time of the fire than when the insurance was effected, the plaintiffs were not entitled to recover thereon.

Held, further, That in the plaintiffs' action upon the policy issued to them, evidence of the former insurances was admissible as tending to show, in connection with other facts, that the defendants were aware of the general purposes for which the building was used, and designed to assume a risk of the same character. *The Mayor, &c., of New York v. The Exchange Fire Ins. Co.*, 424

27. In an action against bankers or collecting agents, to recover damages for their neglect to present a

- note intrusted to them for collection or give notice of non-payment to the indorsers, the burden of proof is on the defendants to show the insolvency of the indorsers, if they rely on that fact as a defense. *Coghlan v. Dinmore*, 453
28. Whether the burden of proof is upon the plaintiff to show the insolvency of the maker? *Query. id.*
29. Evidence that it was the custom of hardware merchants to transmit to their consignee immediate notice of having made a consignment, held inadmissible, the plaintiffs, in this case, having acted only as agents, and not as vendors. *Field et al. v. Bunker*, 467
30. The plaintiffs alleged in their complaint, that their assignors having chartered a vessel, earned freight, which the defendants, the consignees of the vessel, had collected and refused to pay over. The defendants, in their answer, denied that the plaintiffs' assignors had chartered the vessel in any other way than by a charter-party, which provided that their right to any share of the freight should be contingent on the freight exceeding \$25,000.
Held, That this put in issue plaintiffs' allegation of a charter, and that the plaintiffs must prove, either an unconditional charter, or that under the charter alleged by defendants the freight had exceeded \$25,000. *Patrick et al. v. Metcalf et al.*, 483
31. In an action brought to recover damages from the defendants for negligently running over the plaintiff in the street, it appeared that the plaintiff, when crossing at a street corner, was knocked down by defendant's vehicle, which was driven at a rapid rate around the corner. *Held*, that an ordinance of the corporation, forbidding driving faster than a walk in going around the corner of any street, was admissible in evidence, not as furnishing proof of negligence on the part of defendants, but as tending to relieve the plaintiff from the imputation of negligence on his part. *Williams v. O'Keefe et al.*, 536
32. Upon a question of negligence in mooring a vessel, it is proper to ask a witness, who has been shown competent to give an opinion, what was the condition of the fastenings of the vessel, as to safety; this is a subject of science and experience, not of common knowledge. *Moore v. Westervelt*, 558
33. Declarations or admissions in respect to the stowage of a cargo, made by a stevedore while employed by the owner of the cargo to stow it, are not admissible in evidence against the owner. *Mallory et al. v. Perkins et al.*, ... 572
34. The testimony of a witness as to a matter of fact is not affected by proof that he was a public officer required by law to make a record of the facts in question; and that such record, as originally made by him, did not include a statement contained in his oral testimony. Hence, proof of the alteration of the record by subsequent insertion of such statement is inadmissible to contradict his oral testimony. *id.*
35. Under section 388 of the Code of Procedure, which enlarges the remedy for obtaining discovery and inspection of books and papers pending suit, if a party establishes, to the satisfaction of the Court or Justice, that any book, paper or document is in the possession or under the control of the adverse party, containing competent evidence relating to the merits of the action or defense, its production for inspection may be compelled. *Case v. Banta*, 595
36. Thus, where, in an action for breach of warranty on a sale of goods, the plaintiffs, on affidavit that there was a written contract which they had not known, or had forgotten at the commencement of the action, and that it was in the

possession of defendant, who refused to exhibit it or give a copy, and that it was material to them in the action; *Held*, that they were entitled to an order requiring defendant to give them an inspection and copy, or permission to take a copy,.....*id.*

37. The Court will not entertain a motion to suppress answers in a deposition taken on commission, upon an objection going, not to the regularity of the execution of the commission, but merely to the admissibility of the witnesses' evidence. *Howard v. The Orient Mutual Ins. Co.*,645

38. In interrogatories to take the deposition of a witness upon commission, a cross-interrogatory, asking if a log-book was kept on a certain vessel, and if so, whether it did not contain a statement upon a subject in question, and requiring the witness to produce the log-book, is not sufficient to require the book or a copy of it, to be annexed to the deposition. The witness should be required to annex a copy, if it be desired to make it an exhibit.....*id.*

See **BANKING**, 2.

COMMON CARRIER, 1.

CONTRACTS, 1, 2, 15, 23, 24.

DEPOSITION, 1.

INSURANCE, 3.

NEGLIGENCE, 6.

PARTNERSHIP, 4.

TITLE TO REAL PROPERTY, 3.

UNLAWFUL ASSEMBLY, 4.

WITNESS, 6.

EXECUTORS AND ADMINISTRATORS.

1. Executors, to whom real property is devised by their testator's will, have an insurable interest therein by virtue of the trust; and where the insurers issue a policy to the testator in his lifetime, which does not require him to show that he was owner in fee, nor forbid an assignment of the property, and

after his death they renew the insurance in favor of his executors, without inquiry or representations as to their interest, the executors may recover thereon, although before the renewal their interest has been, without the knowledge of the insurers, but in good faith, changed to a mortgage interest, by their selling the property, and taking back, at the same time, a purchase-money mortgage. *Phelps v. The Gebhard Fire Ins. Co.*,...404

2. Thus, where an insurance company of the city of New York, insured a resident of the city upon a house, described as "his dwelling house" in another State, but without any representations or inquiries as to its occupancy, or as to the nature of his interest; and after his death, of which they were informed, they issued to his executors, also residents of New York, successive annual renewal receipts, in the name of the estate or of the executors, and before the last of such renewals, which was given to the sole surviving executrix, she, in good faith, but without notice to the company, had sold the property, taking back a purchase-money mortgage:

Held, 1. That under these circumstances, and upon a fair construction of the provisions of the policy, a change in the nature or extent of the insured's interest in the property would not invalidate the policy, the interest having been continuous, and the risk not increased.

2. That his death did not terminate the policy.

3. That the renewals having been granted to the executors, without inquiry or representations, the company must be held to have insured such interest in the property as had become vested in the executors by the will, and by their acts as executors; and that the surviving executrix was entitled, by virtue of her interest as mortgagee, to recover, upon a loss...*id.*

3. The due publication, by an executor or administrator, of a notice requiring persons having claims against the estate represented by him to exhibit the same, with the vouchers thereof, within six months after its first publication, at a place which was neither his residence nor the place of the transaction of his business, but merely the office of his counsel, is insufficient to create the statutory bar against claims against the executors and administrators of an estate, by the like publication of a notice requiring claims against such estate to be presented, similarly sustained, "at the place of residence, or transaction of business," of such representative. (2 R. S., 88, § 34.) *Murray v. Smith*, 689
4. Whether a publication in one paper alone is sufficient, and whether the order must not express that the Surrogate was of opinion that the paper, which he designated was the most likely to convey information to creditors? *Query. id.*
5. The provision of the Code of Procedure, (§ 317,) preventing costs from being recovered against executors, &c., where they are exempt by the provisions of the Revised Statutes, is intended only to exempt them personally, and not to exempt the estate. *id.*

F.

FACTOR.

1. The defendants, *del credere* factors, on being applied to by their principals for advances, rendered an account of sales, showing sales at various dates, and specifying an average date at which the total balance would become due, and gave their acceptances for the amount, payable at that date; but before the acceptances matured they gave their principals notice that they could not pay them. *Held*, That the giving of the accept-

ances was no bar to an action by the principals against the factors, upon their liability as such, and that in such action the defendants were liable for interest from the day specified, without any further demand. *Blakely v. Jacobson et al.*, 140

2. A *del credere* factor, who by the default of purchasers has become liable to pay the price to his principal, is chargeable with interest, without demand. (*Per ROBERTSON, J.*) *id.*
3. Where a factor, having possession of goods consigned to him, on which he has a lien for charges, makes a valid general assignment for the benefit of his creditors, and delivers such goods to his assignee, and they are subsequently seized by the Sheriff under process against the factor, the assignee is the proper person to whom the owner of the goods should tender the charges, in order to acquire a right to their possession. *Cook v. Kelly*, 358

FRAUDULENT CONVEYANCES.

1. An assignment purporting to transfer real as well as personal property, for the benefit of creditors, is not rendered void by a direction to pay rents, taxes and assessments which may become due before the lands can be sold. If the assignment contemplates an immediate sale, such a provision may, in the absence of evidence to the contrary, be presumed to have been intended for the benefit of the creditors, by increasing the fund. *Morrison et al. v. Atwell et al.*, 503

G.

GIFT.

1. The plaintiff having a fund in the hands of the defendants, his bankers, directed them to place the

same to the credit of accounts to be opened by them for that purpose, in the names of his children, who were of tender years; but, after the defendants had done so, they continued to recognize the authority and directions of the plaintiff in the management of the fund, and it did not appear that he had been indebted to the children, or had received any consideration upon the transfer of the credits, or that the children ever had notice thereof, or received possession of the securities:

Held, That, notwithstanding such change in the accounts, the plaintiff could maintain an action in his own name, to recover from the defendants the balance due thereon. *Geary v. Page et al.*,290

2. The change in the accounts, under such circumstances, is neither a transfer of the fund or securities themselves, nor a gift *in presenti* nor *in futuro*.*id.*

GUARANTY.

See CONTRACTS, 20.

GUARDIAN AND WARD.

1. An agreement between the guardian of an infant and the person becoming surety in his official bond, that the latter shall hold the property of which the guardian is custodian, for his own indemnity, is void, because subversive of the objects of the appointment and security, and contrary to public policy. The guardian cannot pledge the property of his ward as security to his own surety. *Poulney v. Randall*,232
2. Hence it is no defense, in an action by the guardian, against one who has collected moneys of the estate and refuses to pay them over, to show that the defendant became the guardian's surety upon such an agreement, and that the guardian is insolvent, and to offer to pay money into Court.*id.*

H.

HABITUAL DRUNKARD.

1. Where, pending a suit brought by a creditor to reach the assets of his debtor, the latter is, by proceedings previously commenced in another Court, adjudged to be an habitual drunkard, and a committee is appointed of his estate, the Court in which the former suit is pending, cannot properly proceed to final judgment. *Niblo v. Harrison et al.*,668
2. The plaintiff, in such case, if he has commenced his action in good faith, may be permitted to retain it; but his proceedings therein should be stayed, until the reformation of the defendant, and the discharge of his committee, if such event should occur.*id.*
3. If a Receiver has been appointed, he should be discharged, on paying the moneys in his hands into Court.*id.*
4. It seems, that in an action in the nature of an action at law, the plaintiff in such case, may be permitted to proceed to judgment, upon which he may apply to the Court having jurisdiction of the estate, to require the committee to pay it.*id.*

HUSBAND AND WIFE.

1. Tradesmen who sell goods to a wife upon her husband's account, after notice from him not to do so, cannot recover from him therefor, unless they show a subsequent promise by him to pay, or that the goods sold were necessary and suitable to her condition in life, and that she was not otherwise provided for by her husband. *Theriot et al. v. Bagioi*,578
2. If the husband had given such notice, the burden of proof is upon the plaintiffs to show that the

goods sold were necessary, and not provided by the husband.....*id.*

See *DIVORCE*, 1, 2.

I

IMPRISONED DEBTOR.

1. The fact that a defendant, who has been adjudged to execute a release or conveyance, is in prison, does not absolve him from the obligation of executing such instrument when demanded. *Morris v. Walsh*,.....636

INDORSEMENT.

See *BILLS AND NOTES*.

INFANT.

1. In an action in which the Court have jurisdiction of the parties and the subject matter, the omission of an infant plaintiff to procure the appointment of a guardian *ad litem*, is an irregularity which may be cured or waived. It does not deprive the Court of jurisdiction. *Rutter v. Puckhoffer et al.*,638
2. The defect is cured if the plaintiff attains majority before the defendants raise any objection.....*id.*

INSURANCE.

1. The defendants, an insurance company, issued to D. & Co., their agents, a marine policy, to cover only property, to be indorsed by D. & Co., losses payable to the parties named in certificates to be granted by D. & Co., and the aggregate amount to be thus insured was limited to \$250,000. Subsequently the defendants, by a certificate, increased the amount which the agents might certify, as insured, by the further sum of \$250,000. At a later date they issued to the agents a second policy, similar to the former.

Held, That a certificate of insurance, issued to the plaintiffs, by the

agents, under the second policy, and in terms referring to it, and entered upon it, was not invalidated by the fact that prior insurances, purporting to be made under the first policy and its renewal, exceeded in the aggregate the whole sum which the agents had been authorized by both policies to insure. *Pratt et al. v. The Union Mutual Insurance Company*,....97

2. Where a policy of insurance upon freight of a vessel, which at the time of issuing the policy was in the China seas, provided that the voyage should be "confined to the trade between Atlantic ports of the United States, or the ports of London, Liverpool and Havre, and the Pacific Ocean, China seas, including Australia, Van Diemen's Land and ports in the Indian Ocean;"

Held, That this did not, as matter of law, extend to a voyage made by the vessel in question from Liverpool to New York, on her return from the China seas. *Mallory et al. v. The Commercial Insurance Company*,.....101

3. In an action on such a policy, to recover for a loss upon such voyage, it is for the plaintiffs to show either that there is a single trade between the Pacific Ocean and China seas, &c., as one terminus, and both the Atlantic ports of the United States and the specified European ports, indiscriminately, as the other terminus; or that the language of the policy, by usage, is understood to include a direct voyage between the Atlantic ports of the United States and the specified European ports.....*id.*

4. Executors, to whom real property is devised by their testator's will, have an insurable interest therein by virtue of the trust; and where the insurers issue a policy to the testator in his lifetime, which does not require him to show that he was owner in fee, nor forbid an assignment of the property, and after his death they renew the insurance

in favor of his executors, without inquiry or representations as to their interest, the executors may recover thereon, although before the renewal their interest has been, without the knowledge of the insurers, but in good faith, changed to a mortgage interest, by their selling the property, and taking back, at the same time, a purchase-money mortgage. *Phelps v. The Gebhard Fire Insurance Co.*,...404

5. Thus, where an insurance company of the City of New York, insured a resident of the city upon a house, described as "his dwelling house" in another State, but without any representations or inquiries as to its occupancy, or as to the nature of his interest; and after his death, of which they were informed, they issued to his executors, also residents of New York, successive annual renewal receipts, in the name of the estate or of the executors, and before the last of such renewals, which was given to the sole surviving executrix, she, in good faith, but without notice to the company, had sold the property, taking back a purchase-money mortgage:

Held, 1. That under these circumstances, and upon a fair construction of the provisions of the policy, a change in the nature or extent of the insured's interest in the property would not invalidate the policy, the interest having been continuous and the risk not increased.

2. That his death did not terminate the policy.

3. That the renewals having been granted to the executors, without inquiry or representations, the company must be held to have insured such interest in the property as had become vested in the executors by the will, and by their acts as executors; and that the surviving executrix was entitled, by virtue of her interest as mortgagee, to recover, upon a loss.....*id.*

6. Under a lease of vacant ground, at a nominal rent, with covenants on

the part of the lessees to erect a valuable building of a permanent nature, and at the expiration of the term to surrender the premises in as good condition as reasonable use and wear will permit, damages by the elements excepted, and with no reservation of a right to remove the building, such building belongs to the lessors, at the expiration of the term, and they then have an insurable interest therein. *The Mayor, &c., of New York v. The Exchange Fire Insurance Co.*,...424

7. Where a building was originally constructed, and several times used, for the purposes of an exhibition of industry, or fair; and the defendants, knowing its use, had several times insured its owners or lessees in respect to it, and the plaintiffs, subsequently becoming its owners, procured the defendants to insure them in respect to it:

Held, That the plaintiffs had a right, after obtaining such insurance, to occupy and use the building for the same purposes; but that, if it was used otherwise than as a mere place of exhibition, or was so occupied or used as to render the hazard greater at the time of the fire than when the insurance was effected, the plaintiffs were not entitled to recover thereon.

Held, further, That, in the plaintiffs' action upon the policy issued to them, evidence of the former insurances was admissible as tending to show, in connection with other facts, that the defendants were aware of the general purposes for which the building was used, and designed to assume a risk of the same character.....*id.*

INTEREST.

1. The defendants, *del credere* factors, on being applied to by their principals for advances, rendered an account of sales, showing sales at various dates, and specifying an average date at which the total balance would become due, and gave their acceptances for the

amount, payable at that date; but before the acceptances matured they gave their principals notice that they could not pay them. *Held*, that the giving of the acceptances was no bar to an action by the principals against the factors, upon their liability as such, and that in such action the defendants were liable for interest from the day specified, without any further demand. *Blakely v. Jacobson et al.*, 140

2. A *del credere* factor, who by the default of purchasers has become liable to pay the price to his principal, is chargeable with interest, without demand. (*Per ROBERTSON, J.*)*id.*

JOINT LIABILITY.

See CONTRACT, 18.

JUDGMENT.

1. Where the Receiver of a dissolved corporation brought an action against the executors of the deceased president and treasurer, to recover from his estate the amount of moneys of the corporation which he had loaned to stockholders, without authority and contrary to the statute, the defense interposed was that the trustees of the corporation had ratified the act. The Referee before whom the cause was tried reported substantially the facts alleged in the complaint, and, as a conclusion of law, found that the plaintiff was entitled to recover, but did not expressly negative the alleged ratification. The only evidence of any ratification was that in an annual report of the company, a part of the sum was mentioned as loaned to certain stockholders. *Held*, that the judgment for the plaintiff was correct. *Clarke v. Acosta et al.*,158
2. A finding of the Referee contained in the case, as settled, that the deceased, after making the loan, in-

formed the trustees and stockholders that he had made it, there being no other evidence of his giving such information than the annual report above mentioned, does not conflict with the presumption arising from his reporting in favor of plaintiff, that he found against the defendants on the question of ratification.*id.*

3. The Judge before whom this action was tried at Special Term, having found, as conclusions of fact, that the plaintiffs, in November, 1856, "compounded from cocoanut oil and other ingredients, a mixture to be used as a hair wash, for which they devised as a trade-mark * * * the name or word 'Cocaine,' that they published the same very extensively, with notice that they had adopted the said name or title as their trade-mark;" and that the defendants, in November, 1858, "commenced the preparation and sale of a similar compound in bottles * * * and with labels under the name and title of 'Cocaine,' and, further, (as the fifth finding) "that the defendants well knowing that the name, word or title of 'Cocaine' was, and for a considerable time had been, the trade-mark of the plaintiffs, with the wrongful intention of inducing the public to believe that the compound sold by themselves under the name, word or title, of 'Cocaine,' was that of the plaintiffs, and with the wrongful intention of securing to themselves the benefit of the skill, labor and expense of the plaintiffs, have so closely imitated and used the aforesaid trade-mark of the plaintiffs as to deceive the public, and to injure and endamage the plaintiffs; that the word, name, title, or device, 'Cocaine,' is a spurious and unlawful imitation by the defendants of the word, name, title or device 'Cocaine,' the aforesaid trade-mark of the plaintiffs." It was *Held*, that the plaintiffs were entitled to a judgment enjoining the defendants from manufacturing,

using, or selling, or in any manner, disposing of a compound or preparation with the name, word or title of 'Cocaine,' printed or stamped upon the labels, bottles, wrappers, covers or packages thereof.

The evidence on which the facts were found, is stated in the opinions delivered; ROBERTSON, J., dissenting from the conclusion that it was sufficient to sustain them. *Burnett et al. v. Phalon*,.....192

4. In an action of this nature the judgment cannot direct the damages to be assessed by a Sheriff's Jury. The proofs must be taken by the Court or a Referee. *Guthrie et al. v. Lindo*,.....605
5. Where, in such a case, judgment is ordered for frivolousness of defendant's pleadings, the judgment should either be in the form proper where nothing is left to be ascertained but the amount of damages, or it should simply adjudge the pleading frivolous and leave the plaintiff to apply to the Court for the relief he seeks.....*id.*

See ACTION, 3, 6.

L.

LANDLORD AND TENANT.

1. A tenant being put out of possession, may defend an action for the rent, by proof that he was ousted by one having a title paramount to that of the landlord, although the ouster was not by virtue of a judgment, decree or any legal process; such tenant taking the burden of proof that he acted in good faith, and that such title was in fact paramount. *Moffat v. Strong*, 57
2. It is not an unqualified rule that a tenant, put in possession by his lessor, may not deny the title of the latter. The rule is, that a tenant may not accept possession from

a lessor, hold and enjoy under the demise, and then refuse to pay the rent, or refuse to yield the possession to his lessor at the termination of his lease, and justify such refusal in either case, by alleging or proving that the lessor, under whom he has had such enjoyment, had in fact no title. But eviction under title paramount is a defense, whether such title was in the evictor before the lease, or was acquired by him after the lease was executed.....*id.*

3. If such eviction or ouster is from a part of the demised premises, it entitles the tenant to an apportionment of the rent, and an abatement according to the relative value of the part from which he is evicted.....*id.*
4. The defendant was tenant of a lot of land, and buildings thereon, under a lease from the plaintiff, for the term of three years. The owner of the adjoining lot was, in fact, the owner of a strip of land within and along the side of the demised premises, and on which, in part, the wall of the buildings rested; and he notified the defendant of the encroachment, and that he was about to excavate under the wall, and required him to remove the wall. The defendant gave written notice of this claim to the plaintiff, and required him to defend his rights as he might be advised, and notified him that he should hold him responsible for any damages sustained; but the plaintiff taking no measures to protect the wall or prevent its removal, and the excavation being commenced, the defendant, in view of the danger caused by the undermining of the wall, took it down and rebuilt it on the line of the plaintiff's lot. In the plaintiff's action to recover the rent:

Held, 1. That these facts constituted such an eviction by paramount title, from a part of the demised premises, as to suspend a portion

of the rent, and were available as a defense thereto.

2. That they were also a breach of the implied covenant for quiet enjoyment, and were available as grounds for a counterclaim to the rent.....*id.*

5. Under a lease of vacant ground, at a nominal rent, with covenants on the part of the lessees to erect a valuable building of a permanent nature, and at the expiration of the term to surrender the premises in as good condition as reasonable use and wear will permit, damages by the elements excepted, and with no reservation of a right to remove the building, such building belongs to the lessors, at the expiration of the term, and they then have an insurable interest therein. *The Mayor, &c., of New York v. The Exchange Fire Ins. Co.*,.....424

LEASE

1. Leases for a term not exceeding three years are not within the statute, (1 R. S., 738, § 140,) which declares that no covenant shall be implied in any conveyance of real estate. *Moffat v. Strong*,57
2. The implied covenant for quiet enjoyment which arises upon such a lease is broken by an expulsion, by one having paramount title, without any judgment or decree, *id.*

See INSURANCE, 6.

LIEN.

1. A bailee of goods having a lien thereon for a sum far exceeding their value, who, when the goods are attached in his hands by a creditor of the bailor, certifies, in good faith, that he holds no goods for the benefit of the latter, does not thereby forfeit his lien. *The Bank of Mutual Redemption v. Sturgis et al.*,.....660

See BANKING, 1.

M.

MAYOR.

See ACTION, 1.

MORTGAGE.

1. A mortgage of real property (with the bond to which it is collateral) is the subject of a pledge. Mortgages are now regarded as mere securities and chattel interests, and may be pledged like other chattels and things in action. *Campbell v. Parker*,.....322

See EVIDENCE, 24.

EXECUTORS AND ADMINISTRATORS, 1, 2.

N.

NEGLIGENCE

1. Where a vessel becomes a wreck, and sinks in navigable waters, without fault of the owner, and so as to be immovable by ordinary means, if the owner or any transferee, instead of abandoning it, retains such possession and control as the thing is susceptible of, he is not liable for any injury occurring while he is in the exercise of due care and diligence to prevent it. So long as he is using all reasonable means to effect its removal, without being able to accomplish it, he is not liable for any damages resulting from the mere fact of its non-removal. *Taylor et al. v. The Atlantic Mutual Insurance Co. et al.*,...369
2. Negligence in the use of means to remove the wreck is not necessarily established by proof that the means first employed were inadequate. If they were such as the best skill and the largest experience selected, in good faith, as adapted to the end to be accomplished, negligence cannot be predicated of their failure. The owner is not responsible for failing to remove the wreck if, after having made proper arrangements

for carrying on the work, those arrangements failed without any fault on his part.....*id.*

3. It is not incompatible with the owner's duty, for him to adopt a plan for the removal, which embraces the design of saving as much as possible of the wreck and cargo.
id.

4. In an action brought to recover damages from the defendants for negligently running over the plaintiff in the street, it appeared that the plaintiff, when crossing at a street corner, was knocked down by defendants' vehicle, which was driven at a rapid rate around the corner. *Held*, that an ordinance of the corporation, forbidding driving faster than a walk in going around the corner of any street, was admissible in evidence, not as furnishing proof of negligence on the part of defendants, but as tending to relieve the plaintiff from the imputation of negligence on his part. *Williams v. O'Keefe et al.*, 536

5. In such actions, negligence, whether on the part of the plaintiff or defendant, is a question of fact for the Jury to determine.....*id.*

6. Unless the proof of negligence on the part of the plaintiff is so strong that the Court would set aside a verdict in his favor as being clearly against the weight of evidence, it is not proper to take that question from the Jury, by granting a nonsuit at the trial.....*id.*

7. Upon a question of negligence in mooring a vessel, it is proper to ask a witness, who has been shown to be competent to give an opinion, what was the condition of the fastenings of the vessel, as to safety; this is a subject of science and experience, not of common knowledge. *Moore v. Westervelt*,558

8. A Sheriff, in respect to property in his custody, is bound to exercise that degree of care, and no greater,

which a careful, prudent man, of good sense and judgment, would exercise respecting such property, if it were his own.....*id.*

NEGLIGENCE

See *SHERIFF*, 3, 4.

NEGOTIABLE PAPER

See *BILLS AND NOTES*.

NEW YORK, CITY OF.

1. The Street Commissioner of the City of New York, and not the Commissioner of Repairs and Supplies, is the proper officer to authorize the widening of the carriage way in a street in the city. *O'Rourke v. Hart*,301
2. The Corporation of the City of New York, with the consent of the counsel to the Corporation, may appear, in actions to which they are parties, by other attorneys of record, and other counsel. *The Mayor, &c., of New York v. The Exchange Fire Ins. Co.*,424

See *ACTION*, 1.
NEGLIGENCE, 4.
WRECK, 5.

NEW TRIAL

1. Where it appeared that a verdict was rendered upon incompetent evidence necessarily calculated to affect the result; that there was much reason to suppose injustice had been done; and that defendant, though personally liable, was acting in a representative capacity,—*Held*, That although there was no sufficient exception to the incompetent evidence, a new trial should be granted on terms, unless plaintiff would stipulate to reduce the verdict. *Scott v. Lilienthal*,224
2. Where the contract sufficiently expresses the consideration on its face, a new trial will not be granted for error in admitting evidence of the actual consideration in support

of the validity of the contract.
Howard v. Holbrook et al., . . . 237

3. *Held*, That even if the assessment of the value were not proper, the Court would not, before judgment, order a new trial on that ground. (*Per Bosworth, Ch. J.*) *Tracy v. The New York & Harlem R. R. Co.*, . . . 396
4. Wherever the Court, on a supposed state of facts, instructs the Jury, if they so find the facts, to render a verdict for the plaintiff, when the instruction should have been to find, in that event, a verdict for the defendant, the remedy, if no exception is taken, is to move, on a case, for a new trial. *Brush v. Kohn*, . . . 589
5. This rule applies where the defendant tendered and paid into Court the amount due, and the Judge directed, and the Jury accordingly found a verdict for the plaintiff for that sum, instead of a verdict for defendant. . . . *id.*
6. The Court will not, in the exercise of its discretion, grant a third trial of an action to recover possession of lands, to a party who, upon the two previous trials, has lost his case, by overlooking a point of law, or conceding a fact, or by omitting to seek a remedy, by an appeal from an erroneous ruling, or an unimportant question of evidence, unless he is shown to have been thrown off his guard. The fact that the defendant, in another cause, tried subsequently, succeeded, by raising the objections which were not raised in the present case, is not, necessarily, ground for granting the application. *Wright et al. v. Milbank*, . . . 672

NOTICE OF PROTEST.

See **BILLS AND NOTES**, 1.

O.

OFFICER.

See **EVIDENCE**, 35.

ORDINANCE.

See **NEGLIGENCE**, 4.

OUSTER.

See **LANDLORD AND TENANT**, 1, 2, 3.

P.

PARTNERSHIP.

1. In a copartnership, the partners may stipulate simply as to the profits, where one is to furnish all the materials, while both may bestow labor; and in such case, the only specific interest of all is in the profits, and, as to the property, the partnership is only in the use or employment of it as an instrument of profit. *Penny v. Black*, . . . 310
2. Where C. and B. formed a partnership in the business of making, selling and letting chronometers, C. contributing all the capital, and B. giving his labor only, and receiving his salary and a share of the profits, and C. agreed to put into the stock of such partnership certain chronometers which were his property, upon a stipulation "that they should be taken at a fair valuation, as a stock in trade, so that upon a sale of them at the usual market price, the profit usual in that branch of business might be made on them," but this agreement was never reduced to writing, as was intended, nor was a valuation ever fixed upon; and, after dissolution of the firm, both partners remained in the store they had occupied as partners, and C. let the chronometers in his own name, and kept his own accounts of them, and there was some evidence that it was understood between the parties that C. was to take the stock and pay the debts:

Held, That after such dissolution, the chronometers were the property of C., and that his lessee of one of them could recover possession of it

- from B., who had taken it away from him.....*id.*
3. Upon such an agreement, the chronometers did not become the property of the firm, but continued always the property of C., the firm having a permission to use them. *id.*
4. *Held further*, That, if this were not so, yet the evidence in this case was sufficient to show that, upon the dissolution of the firm, B. had relinquished any interest in them, and transferred them to C.*id.*
5. One who receives a note, indorsed in the name of a partnership, knowing at the time that the indorsement was not given for a partnership debt or in the partnership business, but was written by one member of the firm, in a matter not relating to the firm's business, but on the contrary, for the accommodation of another person, cannot recover thereon against the other members of the firm. *Fielden et al. v. Lahens et al.*, 436
6. Where copartners made an assignment which recited their copartnership, and their indebtedness as such, and assigned all the "property of every name and nature whatsoever of the said parties of the first part:"
- Held*, That this was not an assignment of the individual property of the members of the partnership; and hence a direction in the assignment to pay rents, &c., due on lands, &c., assigned, did not apply to rents due from one partner individually for his dwelling house. *Morrison et al. v. Atwell et al.*, 503
7. A conveyance, by one member of a solvent firm, of his undivided interest in the real estate of the partnership, to a stranger, whether made upon a sale, or by way of payment of his individual debt, is valid as against the copartners; and they cannot maintain an action to have it set aside on the ground that it was made without their con-

sent, and impairs the credit of the firm. *Treadwell et al. v. Williams et al.*, 649

8. If creditors do not object, the purchaser takes a good title, and it does not lie with the other members of the firm to object; or, at least, to enable them to do so they must show that the partnership debts exceed the assets, and that there is need of the property in question to provide for the deficiency and equalize the interests of the partners.*id.*

See ASSIGNMENT, 4.

PARTY WALL.

1. The term "party wall," when used in such an instrument, without restrictive terms, and in its general ordinary signification, means a dividing wall between two houses, to be used equally for all the purposes of an exterior wall, by both "parties," that is, by the respective owners of both houses. This use, in its full, unrestricted sense, embraces not only the use of the interior face or side of the wall, but also such use of it as is necessary to form a complete and perfect junction in an ordinary good mechanical manner, between it and the other exterior walls of the house. (*Per WHITE, J.*) *Fetters v. Leamy*, 510 ✓

See TITLE TO REAL PROPERTY.

PAYMENT.

See EVIDENCE, 15.

PLEADINGS.

1. *Complaint.*
2. *Answer.*

1. *Complaint.*

1. A complaint which sets forth a copy of a promissory note, and alleges that there is due to the plaintiffs thereon, from the defendants, a certain sum, for which

judgment is demanded, is sufficient under section 162 of the Code. It is not necessary to allege that the defendants made the note, nor to show how they are connected with it.

So held, where the note sued upon was signed by a firm. *Butchers' and Drovers' Bank v. Jacobson*, 595

2. In an action to recover money lost at play, a complaint pursuing the form allowed by 2 Rev. Stat., 347, § 1, for declarations in actions of debt to recover any money, goods, and things received contrary to statute, stating that on a day named, the defendant received a specified sum belonging to, or on account of the plaintiff, and which is now due him, contrary to the provisions of the statute, designating it, is not demurrable for not stating facts sufficient to constitute a cause of action. The averment that the money was received and is due plaintiff is sufficient upon demurrer, and the superfluous statement that it was received contrary to statute, will not vitiate the complaint. *Betts v. Bucke*, 614

3. A complaint alleging that between specified days the plaintiffs sold and delivered to defendant, at his special instance and request, a large quantity of boots and shoes of a specified value, and that there is due and unpaid therefor a sum designated which he promised to pay them; but though often requested by them, has wholly refused, is sufficient on demurrer. *Phillips et al. v. Bartlett*, 678

4. In an action by several plaintiffs to recover for goods sold and delivered, an allegation of partnership is not necessary, and the allegation of sale and delivery sufficiently implies that the goods belong to the plaintiff. *id.*

2. Answer.

1. It seems that illegality in a contract sued on, though shown by the

testimony, cannot avail the defendant, unless it is alleged in the pleadings; and that an allegation in the answer that the contract was illegal, coupled with an enumeration in the same paragraph, of specific grounds of illegality, does not entitle the defendant to prove any ground of illegality not so specified. *Dingeldien v. The Third Avenue Railroad Co.*, 79

2. The plaintiffs alleged in their complaint, that their assignors having chartered a vessel, earned freight, which the defendants, the consignees of the vessel, had collected and refused to pay over. The defendants in their answer denied that the plaintiffs' assignors had chartered the vessel in any other way than by a charter-party, which provided that their right to any share of the freight should be contingent on the freight exceeding \$25,000.

Held, That this put in issue plaintiffs' allegation of a charter, and that the plaintiffs must prove, either an unconditional charter, or that under the charter alleged by defendants the freight had exceeded \$25,000. *Patrick et al. v. Metcalf et al.*, 483

3. It is essential to the sufficiency of an answer stating new matter as a defense, that it state facts which, if true, will bar the action, or so much of it as is attempted to be answered. *Carter v. Koesley*, .. 583

4. In an answer setting up title or right of possession to land, under a sale for taxes, it is not enough to allege that the property was duly sold for non-payment of a tax duly imposed according to the statute. It is essential to state facts showing that a tax was duly imposed on the property, for the non-payment of which the authorities might lawfully sell it, and that the proof of non-payment required by the statute to authorize a sale, had been made. *id.*

5. An answer, which is defective in this respect, is not aided by section 161 of the Code of Procedure, which authorizes pleading a judgment or other determination of a Court or officer of special jurisdiction, by stating that it was duly given or made, without stating the facts conferring jurisdiction. If the imposition of a tax could be deemed to be within this provision, the answer should designate by whom the tax was imposed....*id.*

6. In an action brought to enjoin the defendants from infringing plaintiffs' trade mark, an answer alleging that the defendants had sold only a very small and specified quantity of merchandise bearing the label complained of, and that the same was sold to the plaintiffs' agent at their request, and that the use of the label was accidental, without intent to defraud plaintiffs or imitate their label, and did not represent the article to be the plaintiffs', is not frivolous. *Guthon et al. v. Lindo*,.....605

7. An allegation in the complaint that an assignment, which the plaintiffs seek to set aside, was made with intent to hinder, delay and defraud creditors, &c., is sufficiently put in issue by a denial that the assignment was made with intent to hinder and defraud creditors. *Read et al. v. Worthington et al.*,.....617

8. Upon a complaint being amended in a material particular, the defendant's right to answer the amended complaint, by interposing any defense which he may possess, is absolute and unrestricted. *Harriott et al. v. Wells et al.*,.....631

9. Thus, where, upon a trial of an action brought upon a contract, of which the plaintiffs, in their complaint, alleged performance on their part, they failed to prove full performance, but gave evidence of a waiver of such performance by the defendants, and asked leave to

amend their complaint accordingly, which was allowed on condition that the defendants be allowed to amend their answer so as to meet the plaintiffs' amendment, but the terms or nature of the amendment to be made by defendants was not prescribed:

Held, On defendants' motion after judgment, for leave to amend the answer by interposing the statute of limitations, that unless the plaintiffs elected to withdraw their motion to amend, the judgment should be vacated, and the defendants allowed to amend by interposing the statute of limitations or any other legal defense, without restriction.....*id.*

10. The objection that the allegations of an answer are hypothetical, is not available on demurrer. *Taylor v. Richards et al.*,.....679

11. A defendant in his answer, in order to avoid the cause of action alleged, need not confess it; he may aver that if any such contract as alleged was made, it was made jointly with others.....*id.*

12. An answer setting up the non-joinder of third persons, averred to be jointly liable with the defendants, sufficiently alleges that they are still living, if it alleges that they reside at a place named....*id.*

See AMENDMENT, 1.

PLEDGE.

1. A mortgage of real property (with the bond to which it is collateral) is the subject of a pledge. Mortgages are now regarded as mere securities and chattel interests, and may be pledged like other chattels and things in action. *Campbell v. Parker*,.....322

2. Where a bond and mortgage are transferred by an assignment absolute on their face, but accompanied by a promissory note, made by the assignor, which gives the assignee authority to sell the bond and mort-

gage, upon default of the assignor to pay his debt, the transaction is a pledge of the bond and mortgage, and not a mortgage or sale of them. *id.*

3. The assignee, in such a case, acquires only a special property in them, and is subject to all the duties and obligations of a pledgee. He has no right to sell them, without, at least, a demand upon the assignor for payment of the debt. *id.*

4. Where, in such a case, the pledgee, without demand or notice, transferred the bond and mortgage to a third person, for a sum sufficient to pay the debt, but grossly inadequate to the value of the bond and mortgage, and the latter canceled them.

Held, That this was a conversion of them, and the pledgee was liable, therefore, in an action in the nature of trover. *id.*

5. Such subsequent transfer of the bond and mortgage having been not a sale, but a device to get the mortgage satisfied, and the plaintiff, the assignor, having tendered the debt due, and demanded a reassignment, it is immaterial whether the assignment be regarded as a pledge or a mortgage, for in either case a tender would destroy the pledgee's lien, and trover would lie for the refusal to deliver. (*Per Bosworth, Ch. J.*) *id.*

6. The Broadway Bank loaned money to C., for which they received from him a pledge of stocks as collateral security. They also discounted several notes for him, and received from him a draft on a distant place for collection. Before it was known whether the draft was paid or not, he applied to the president of the bank, saying that he must have the proceeds of the draft immediately, or must suspend payment; and the president asking for collateral security, he answered, "The bank holds all my stocks, and they

are security for all my discounts and this draft," to which the president replied; "If that is so the bank will put the proceeds of this draft to your credit," which was thereupon done.

Held, That this was a pledge in present of the stocks, as security for all the discounts which had been made for C., as well as for the draft in question. (*Roswarsen, J., dissented.*) *Van Blarcom et al. v. The Broadway Bank*, 532

POLICE.

1. The Mayor of the City of New York, claiming, but without right, to be at the head of the police of the city, and having under his control a large body of men organized for that purpose, and known as the Municipal Police, was informed that the Metropolitan Police, which was then the legal police force of the city, were about to eject the Street Commissioner of the city from his office in the City Hall, violently and without process of law. He accordingly called together the Municipal Police, and while they were guarding the building, a Coroner, having an order for the arrest of the Mayor, came to the City Hall to execute it, accompanied by a number of the Metropolitan Police, as a *posse comitatus*, of which the plaintiff was one. Their attempt to enter for the purpose of arresting the Mayor was resisted by the Municipal Police, and in the fray the plaintiff was injured.

Held, 1. That, although the Municipal Police, as an organized police force, was an illegal organization, and the Mayor had abused his authority in keeping it on foot, yet that such assemblage of the men, if solely for the purpose of resisting a forcible expulsion of the Street Commissioner from his office, assuming, as the charge did, that "the Mayor, in his discretion, was authorized, as chief magistrate of the city, to interpose by force, if necessary, to prevent it," was not, necessarily, as matter of law, an unlaw-

ful assembly. The Mayor, being charged with the duty of causing laws for the preservation of the peace to be kept, is not confined to calling to his aid the lawful police for the purpose of resisting unauthorized violence, but may call on any citizens, and may by their aid resist the lawful police, if they are about to commit such wrong. *Slater v. Wood*,15

2. That if the assembly were claimed to be unlawful by reason of the circumstances under which it appeared, and the manner in which the persons composing it were conducting themselves, the question whether these circumstances and conduct were such as would alarm persons of reasonable firmness and courage, is one which belonged to the Jury to decide...*id.*

2. If the assembly was not an unlawful one, the Mayor is not liable in a civil action, for wrongs done by individual members of it, having no connection with the object for which it was convened, to which he was in no way privy, and of the purpose to commit which he had no knowledge or suspicion...*id.*

3. And if the Mayor did not know that the Coroner had previously come to serve the order of arrest, and took no measures to secure a free entrance to him, the mere fact that the Coroner, on coming with the *posse*, made proclamation at the entrance of the City Hall, of the object of his visit, and was resisted by the Municipal Police, would not make the Mayor liable for the plaintiff's injuries.....*id.*

POLICY.

See INSURANCE, 1; 2

POSSE COMITATUS.

See POWER OF THE COUNTY.
CORONER, 2.

POWER OF THE COUNTY.

1. Under the Code of Procedure (§§ 185, 419), the Coroner may

call to his aid the power of the county, in a proper case, in executing an order of arrest in an action in which the Sheriff is a party. *Slater v. Wood*,15

2. The mere fact that the officer had not, at the time of summoning the power of the county, a sufficient cause for summoning them, does not affect the duty of the persons summoned to aid him, if, when they come together, resistance is offered to his executing the process, nor does it affect the consequent liability of those who made or caused such resistance, except that it may perhaps affect the question of damages.....*id.*

PRACTICE.

1. *Parties.*
2. *Appearance.*
3. *Guardian, ad litem.*
4. *Service.*
5. *Arrest.*
6. *Attachment.*
7. *Motion.*
8. *Discovery and Inspection.*
9. *Trial.*
10. *Variance.*
11. *Exceptions.*
12. *Verdict.*
13. *Judgment.*
14. *Costs.*
15. *Amendment.*
16. *Contempt.*
17. *Set-off.*
18. *Appeal.*

1. *Parties.*

1. It seems that the objection of non-joinder of other parties, is waived by setting up a counterclaim in favor of the defendant jointly with the same parties, against the plaintiffs. *Secor et al. v. Law*,163

2. The plaintiff having a fund in the hands of the defendants, his bankers, directed them to place the same to the credit of accounts to be opened by them for the purpose, in the names of his children,

who were of tender years; but after the defendants had done so, they continued to recognize the authority and directions of the plaintiff in the management of the fund, and it did not appear that he had been indebted to the children, or had received any consideration upon the transfer of the credits, or that the children ever had notice thereof, or received possession of the securities:

Held, That, notwithstanding such change in the accounts, the plaintiff could maintain an action in his own name, to recover from the defendants the balance due thereon.

3. The change in the accounts, under such circumstances, is neither a transfer of the fund or securities themselves, nor a gift *in presenti* nor in *futuro*. *Geary v. Page et al.*,.....290

4. The common law rule that in an action on a joint contract, against several persons, the plaintiff cannot recover against either, without establishing that the contract sued upon is the joint contract of all, still applies in actions which were commenced before the enactment of the Code of Procedure. *Fielden et al. v. Lahens et al.*,.....436

5. The provision of section 274 of the Code of Procedure, altering this rule, does not affect actions commenced before the Code; and section 459 of the Code, as amended in 1851, which makes all its provisions apply to future "proceedings" in actions theretofore commenced, merely prescribes the forms to be observed, and does not modify or repeal any rule of law affecting a defendant's liability or a plaintiff's right to recover.....*id.*

6. *It seems* that one to whom a fund was rightfully payable, cannot maintain an action against another, who, merely as agent for an adverse claimant, has collected the fund on behalf of the latter, in disregard of notice from the former

not to do so. *Patrick et al. v. Maltz et al.*,.....433

7. A grantee of land, under a deed which is void by the statute, by reason of the land being held by a third person adversely to the grantor, cannot, upon his grantor's refusal to bring an action to recover the land or to allow such action to be brought in his name, maintain an action against the grantor and the adverse possessor, to have the latter adjudged to surrender possession to the grantor, and the title and possession adjudged to the plaintiff as against the grantor. *Louber v. Kelly et al.*,.....494

8. An action to recover the lands must be brought by the grantor, or in his name, by the grantee; but it cannot be so brought in his name without his consent, except since the statute of 1862.....*id.*

9. The provision of the Code of Procedure — that in actions for recovery of real or personal property, third persons, having an interest in the subject matter may be brought in as parties, upon their own application — is only intended to extend the power formerly possessed by courts of equity, in this respect, to the legal actions designated; and its application is confined to the class of cases in which a bill of interpleader would have accomplished the same end. *Hornby v. Gordon*, 656

10. In an action brought by a vendor of goods, to recover possession of them, on the ground of fraud on the part of the purchaser, third persons claiming under the purchaser, by virtue of contracts with him, and in hostility to each other, should not be granted leave to come in as parties.....*id.*

2. Appearance.

1. The Corporation of the City of New York, with the consent of the counsel to the Corporation, may appear, in actions to which they

are parties, by other attorneys of record, and other counsel. *The Mayor, &c., of New York v. The Exchange Fire Ins. Co.*,.....424

3. *Guardian ad litem.*

1. In an action in which the Court have jurisdiction of the parties and the subject matter, the omission of an infant plaintiff to procure the appointment of a guardian *ad litem*, is an irregularity which may be cured or waived. It does not deprive the Court of jurisdiction. *Rutter v. Puckhofer et al.*,.....638
2. The defect is cured if the plaintiff attains majority before the defendants raise any objection.....*id.*

4. *Service.*

1. Under the Code of Procedure, (§§ 185, 419,) the Coroner may call to his aid the power of the county, in a proper case, in executing an order of arrest in an action in which the Sheriff is a party. *Slater v. Wood*,.....15
2. The mere fact that the officer had not, at the time of summoning the power of the county, a sufficient cause for summoning them, does not affect the duty of the persons summoned to aid him if, when they come together, resistance is offered to his executing the process, nor the consequent liability of those who make or cause such resistance, except that it may perhaps affect the question of damages.....*id.*

5. *Arrest.*

1. In an action to recover the possession of specific personal property, an order of arrest which recites that the cause of action is for a detainer or conversion, and requiring the Sheriff to hold the defendant to bail, in a specified sum, is unauthorized. In such an action, the ground of arrest is a concealment, &c., of the property, and the order must require an undertaking to pay the amount which may be recovered. *Elston v. Potter*,....636

6. *Attachment.*

1. The Code of Procedure does not authorize the issue of an attachment, as a provisional remedy in an action of an equitable nature, where the amount which the plaintiffs may recover must be ascertained by an accounting, and the costs are in the discretion of the Court. *Guilhon et al. v. Lindo*, 601
2. Thus, where in action for an injunction against the infringement of a trade-mark, and for damages, an attachment was issued; *Held*, that it was improvidently granted, and must be set aside. Such an action is not "an action for the recovery of money" within the meaning of section 227 of the Code.....*id.*

7. *Motion.*

1. When the interference of the Court to set off, against a judgment, the costs of an appeal from an order on a summary application after judgment, is invoked by motion, and not by an action, the question is in the discretion of the Court. The Court may, in its discretion, deny such motion, even where the set-off might be enforced by an action. *Purchase v. Bellows*,.....642
2. In an action on a policy of marine insurance, the defendants' remedy, to compel a disclosure by the plaintiff of the number of packages, or the quantity and nature of the cargo lost or injured, and the items of expenses incurred, is by requiring a bill of particulars, rather than by motion to make the complaint more definite. *Cockcroft v. The Atlantic Mutual Insurance Co.*,...681
3. Section 158 of the Code of Procedure authorizes the Court to order a bill of particulars in such case; and the fact that the usual preliminary proofs or adjustment of loss had been made before the

who were of tender years; but after the defendants had done so, they continued to recognize the authority and directions of the plaintiff in the management of the fund, and it did not appear that he had been indebted to the children, or had received any consideration upon the transfer of the credits, or that the children ever had notice thereof, or received possession of the securities:

Held, That, notwithstanding such change in the accounts, the plaintiff could maintain an action in his own name, to recover from the defendants the balance due thereon.

3. The change in the accounts, under such circumstances, is neither a transfer of the fund or securities themselves, nor a gift *in presenti* nor in *future*. *Geary v. Page et al.*,.....290

4. The common law rule that in an action on a joint contract, against several persons, the plaintiff cannot recover against either, without establishing that the contract sued upon is the joint contract of all, still applies in actions which were commenced before the enactment of the Code of Procedure. *Fielden et al. v. Lahens et al.*,.....436

5. The provision of section 274 of the Code of Procedure, altering this rule, does not affect actions commenced before the Code; and section 459 of the Code, as amended in 1851, which makes all its provisions apply to future "proceedings" in actions theretofore commenced, merely prescribes the forms to be observed, and does not modify or repeal any rule of law affecting a defendant's liability or a plaintiff's right to recover.....*id.*

6. *It seems* that one to whom a fund was rightfully payable, cannot maintain an action against another, who, merely as agent for an adverse claimant, has collected the fund on behalf of the latter, in disregard of notice from the former

not to do so. *Patrick et al. v. Metcalf et al.*,.....483

7. A grantee of land, under a deed which is void by the statute, by reason of the land being held by a third person adversely to the grantor, cannot, upon his grantor's refusal to bring an action to recover the land or to allow such action to be brought in his name, maintain an action against the grantor and the adverse possessor, to have the latter adjudged to surrender possession to the grantor, and the title and possession adjudged to the plaintiff as against the grantor. *Louber v. Kelly et al.*,.....494

8. An action to recover the lands must be brought by the grantor, or in his name, by the grantee; but it cannot be so brought in his name without his consent, except since the statute of 1862.....*id.*

9. The provision of the Code of Procedure—that in actions for recovery of real or personal property, third persons, having an interest in the subject matter may be brought in as parties, upon their own application—is only intended to extend the power formerly possessed by courts of equity, in this respect, to the legal actions designated; and its application is confined to the class of cases in which a bill of interpleader would have accomplished the same end. *Hornby v. Gordon*, 656

10. In an action brought by a vendor of goods, to recover possession of them, on the ground of fraud on the part of the purchaser, third persons claiming under the purchaser, by virtue of contracts with him, and in hostility to each other, should not be granted leave to come in as parties.....*id.*

2. Appearance.

1. The Corporation of the City of New York, with the consent of the counsel to the Corporation, may appear, in actions to which they

are parties, by other attorneys of record, and other counsel. *The Mayor, &c., of New York v. The Exchange Fire Ins. Co.*,.....424

3. *Guardian ad litem.*

1. In an action in which the Court have jurisdiction of the parties and the subject matter, the omission of an infant plaintiff to procure the appointment of a guardian *ad litem*, is an irregularity which may be cured or waived. It does not deprive the Court of jurisdiction. *Rutter v. Puckhofer et al.*,.....638
2. The defect is cured if the plaintiff attains majority before the defendants raise any objection.*id.*

4. *Service.*

1. Under the Code of Procedure, (§§ 185, 419,) the Coroner may call to his aid the power of the county, in a proper case, in executing an order of arrest in an action in which the Sheriff is a party. *Slater v. Wood*,.....15
2. The mere fact that the officer had not, at the time of summoning the power of the county, a sufficient cause for summoning them, does not affect the duty of the persons summoned to aid him if, when they come together, resistance is offered to his executing the process, nor the consequent liability of those who make or cause such resistance, except that it may perhaps affect the question of damages.*id.*

5. *Arrest.*

1. In an action to recover the possession of specific personal property, an order of arrest which recites that the cause of action is for a detainer or conversion, and requiring the Sheriff to hold the defendant to bail, in a specified sum, is unauthorized. In such an action, the ground of arrest is a concealment, &c., of the property, and the order must require an undertaking to pay the amount which may be recovered. *Elston v. Potter*,....636

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7. *Motion.*

1. When the interference of the Court to set off, against a judgment, the costs of an appeal from an order on a summary application after judgment, is invoked by motion, and not by an action, the question is in the discretion of the Court. The Court may, in its discretion, deny such motion, even where the set-off might be enforced by an action. *Purchase v. Bellows*,.....642
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3. Section 158 of the Code of Procedure authorizes the Court to order a bill of particulars in such case; and the fact that the usual preliminary proofs or adjustment of loss had been made before the

action, does not impair the defendants' right to a bill of particulars. *id.*

8. *Discovery and Inspection.*

1. Under section 388 of the Code of Procedure, which enlarges the remedy for obtaining discovery and inspection of books and papers pending suit, if a party establishes, to the satisfaction of the court or justice, that any book, paper or document is in the possession or under the control of the adverse party, containing competent evidence relating to the merits of the action or defense, its production for inspection may be compelled. *Case v. Banta*,595

2. Thus, where in an action for breach of warranty on a sale of goods, the plaintiffs made affidavit that there was a written contract, which they had not known or had forgotten at the commencement of the action, and that it was in the possession of defendant, who refused to exhibit it or give a copy, and that it was material to them in the action: *Held*, that they were entitled to an order requiring defendant to give them an inspection and copy, or permission to take a copy. *id.*

9. *Trial.*

1. In an action to recover possession of specific personal property, and damages for its detention, it is proper that the Jury, on finding for the plaintiff, should assess the value of the property, as well as the damages, although the plaintiff has obtained a delivery before the trial. (*BARBOUR, J., dissented.*) *Tracy v. The New York and Harlem Railroad Co.*,396
2. The Court will not reverse a judgment because the Referees, before whom the cause was tried, excluded an offer of further evidence on the part of the plaintiffs, made after the plaintiffs had rested and a nonsuit had been directed, unless the offer of such evidence showed at least

the counsel's belief that the evidence, if admitted, would aid the plaintiffs. *Fielden et al. v. Lakens et al.*,436

3. Negligence, whether on the part of the plaintiff or the defendant, is a question of fact for the Jury to determine. *Williams v. O'Keefe et al.*,536

4. Unless the proof of negligence on the part of the plaintiff is so strong that the Court would set aside a verdict in his favor as being clearly against the weight of evidence, it is not proper to take that question from the Jury, by granting a nonsuit at the trial,*id.*

5. Where usury is the defense, the plaintiff has a right to have the question whether there was a corrupt agreement, submitted to the Jury; especially where it is to be made out from circumstances, and must be determined, in a great degree, from the intent of the parties. *The Chatham Bank v. Betts*, ...552

6. Where, in case of a breach of trust, the fund remains land, and the plaintiff frames his action to seek specific, equitable relief, joining as defendants with the trustees, third persons who claim an interest in the land, and pending the action the plaintiff files a supplemental complaint, in which he alleges that the land has meanwhile been converted into money, and claims a judgment for damages, as well as all the relief asked in the original complaint, not inconsistent therewith, the action is still triable by the Court without a Jury. *Currie v. Cowles et al.*,642

See EVIDENCE, 6.
JUDGMENT, 5.
SHERIFF, 4.
WRECK, 5.

10. *Variance.*

7. In an action to recover compensation for services, alleged in the complaint to have been performed,

open a promise to pay therefor at an agreed rate of compensation, if the proof is that they were performed on a promise to pay what they were reasonably worth, the variance is immaterial, and the defendant not being misled thereby, the Court may allow an immediate amendment, without costs. *Scott v. Lichtenhal*, 224

11. Exceptions.

8. Where, on request of defendant's counsel, the Court directed that all the evidence of certain witnesses relating to the value of services (and which evidence consisted of their opinions based on the testimony they had heard at the trial) should be subject to exceptions taken in the examination of preceding witnesses; but the exceptions thus referred to related solely to proof of the "ability of the plaintiff as a bookkeeper," or to the objection that such witnesses did not possess the special knowledge essential to make their opinion admissible as evidence:

Held, That this was not equivalent to a specific objection that such latter witnesses did not know what were the particular services, of the value of which they were permitted to express an opinion; but it might be considered in deciding whether the exceptant should be allowed a new trial on terms. *id.*

9. In case a demand made on behalf of the plaintiffs to have the cause submitted to the Jury does not suggest what question, if any, they should be called to pass upon, it is too broad to sustain an exception on a refusal of the demand. (*Per MONCRIEF, J.*) *Taylor et al. v. The Atlantic Mutual Insurance Co. et al.*, 369

10. An exception to a refusal to charge as requested cannot be sustained, where the case states that the Judge refused to give the instructions requested, except so far as they were embraced in the

charge which was in fact given, but does not state the whole of the charge given, so as to make it appear that the request was actually disregarded. *The Mayor, &c., of New York v. The Exchange Fire Insurance Co.*, 424

11. In order to exclude a question which calls for the opinion of a witness, for the reason that he has not been shown competent as an expert, such reason must be specified in the objection. A general objection is properly overruled. *Mallory et al. v. Perkins et al.*, 572

12. Verdict.

1. A general verdict in favor of one party, rendered by the Jury, in obedience to the instructions of the Judge, cannot be corrected on motion, so as to transform it into a verdict for the other party. *Brush v. Kohn*, 589

2. Wherever the Court, on a supposed state of facts, instructs the Jury, if they so find the facts, to render a verdict for the plaintiff, when the instruction should have been to find, in that event, a verdict for the defendant, the remedy, if no exception is taken, is to move, on a case, for a new trial. *id.*

3. This rule applies where the defendant tendered and paid into Court the amount due, and the Judge directed, and the Jury accordingly found, a verdict for the plaintiff for that sum, instead of a verdict for defendant. *id.*

13. Judgment.

1. In an action where the answer by the defendants alleged that they gave acceptances for the amount which the plaintiffs had never surrendered, was struck out upon motion as sham, and judgment entered for the amount claimed, with interest from the date specified as the average maturity of the credits:

Held, on appeal, that as this was the amount which the plaintiffs were

entitled to be paid, and was the precise sum which would have been recovered on the acceptances, the judgment was right and must be affirmed. *Blakely v. Jacobson et al.*, 140

2. Where an action is tried before the Court without a Jury, the only authority for entering judgment is the decision of the Judge who tried the cause. A reference to compute the amount of the recovery, if not authorized by the decision, is irregular. *Chamberlain v. Dempsey*,212

3. Where, on a trial by the Court without a Jury, of an action for the foreclosure of a mortgage, the Judge omits to determine the amount due to the plaintiff, or to direct that there be a reference to ascertain it, and a reference for that purpose is ordered on an application to another Judge, a judgment entered on the report of the Referee so appointed is not only irregular, but erroneous; there is virtually a mistrial, and, on appeal from the judgment, it will be reversed.id.

4. S., one of the defendants, held real and personal property in trust, to be used for the joint benefit of himself and the plaintiff and a third person, in specified proportions, as copartners in a joint enterprise, and under an agreement that he was to make advances for carrying out the enterprise, and that all stocks, or other securities than cash, which should be received, should remain undivided until a final settlement, and that he would not dispose of the property (other than money) without the consent of the others. He accordingly made large advances, and subsequently sold and conveyed all the property without the consent of the plaintiff, and received therefor stock of an incorporated company:

Held, that the plaintiff, by bringing an action with full knowledge of these facts, in which he demanded a transfer of his share of the stock, and obtained an injunction against any

disposal of it pending the action, must be deemed, for the purposes of the suit, to have made his election of this remedy, and must be treated as if he had consented to the sale. *Cheeseman v. Sturges et al.*, 246

5. Hence, the proper relief in such action is, that the plaintiff should pay his proportion of the advances and have a transfer of his share of the stock, and, in default of his paying, that his share of the stock should be sold, and that he should pay the deficiency, if any.....id.

6. The plaintiff is not entitled to a judgment that the whole stock be sold to pay the advances, and that the residue of the proceeds, or the deficiency, if any, be apportioned. The defendant may be allowed to retain his share of the stock, on being charged with his part of the advances.id.

7. After the commencement of the action, but before the trial, the corporation, the stock of which was in controversy, increased its capital stock, without, however, altering the nominal value of a share; and, subsequently, certificates of stock of the new issue were deposited in Court to await the result of the action:

Held, that if the plaintiff desired to make any claim against the defendant, based on his individual acts, in effecting such alteration in the stock pending the action, he should have modified his pleadings accordingly. But by going to trial, he must be deemed to pursue the stock as it existed after such increase.....id.

8. Where an action upon an official bond, *a. g.*, the bond of an administrator, is brought in the name of an individual plaintiff, and not in the name of the people, the judgment should not be for the amount of the penalty, but only for the amount of the damages and costs. *O'Connor v. Such et al.*,318

9. Where, upon the trial of an action for the foreclosure of a mortgage upon real property, the Judge directed judgment for the plaintiff, without, however, awarding costs, and ordered a reference to ascertain the amount due the plaintiff and whether there were any prior liens, &c., and upon the coming in of the report the plaintiff applied to another Judge, without notice to the other parties, and obtained final judgment awarding costs:

Held, that the judgment was unauthorized, and should be reversed on appeal. Whether the first decision was intended to be final or not, it did not warrant such a judgment. The Judge before whom the cause was tried, alone is competent to pass on the question of costs. *Chamberlain v. Dempsey*, 540

10. A judgment directed the defendant to execute a conveyance upon the written demand of the plaintiff; the plaintiff served a copy of the judgment with a written demand, and two months afterward presented to the defendant a proper conveyance, and required its execution.

Held, that defendant's objection that the written demand was not served at the time of requiring the conveyance, was untenable. *Morris v. Walsh*, 636

11. It is no excuse for refusing to execute a conveyance directed by a judgment of Court, that there is no person present to become subscribing witness, nor any commissioner to take the grantor's acknowledgment, or that there is no seal attached to the instrument. *id.*

12. Where, pending a suit brought by a creditor to reach the assets of his debtor, the latter is, by proceedings previously commenced in another Court, adjudged to be an habitual drunkard, and a committee is appointed of his estate, the Court in which the former suit is pending cannot properly proceed to final judgment. *Niblo v. Harrison et al.*, 638

14. Costs.

1. Where the Court has directed the employment of a stenographer on the trial of a cause, the order providing that the expense should be paid by the parties in specified proportions, the prevailing party cannot tax what he paid therefor, as a disbursement in the cause. Section 256 of the Code, which authorizes the employment of stenographers in the first judicial district, contemplates that both parties should share the expense. *Gilman v. Oliver*, 589.

2. The only disbursements which are to be allowed in adjusting the costs in a civil action under the Code of Procedure, are those specified in section 311 of the Code. *Hanel et al. v. Baare et al.*, 682

3. The expenses of exemplified copies of foreign documents are not taxable, especially where there is no affidavit that the documents were actually and necessarily used, or obtained necessarily for use. *id.*

15. Amendment.

1. Where defendants had appealed to the General Term from an order of the Special Term, denying a new trial, under a stipulation that the appeal be heard there without judgment or security; and after the order was affirmed upon the appeal, judgment was entered, and the defendants appealed from the decision of the General Term to the Court of Appeals:

Held, That they were not entitled to have the judgment amended by adding that exceptions had been heard and overruled by the General Term. If defendants feared the Court of Appeals would not regard the exceptions, they should have taken an appeal from the judgment, and the exceptions would necessarily form part of the judgment record. *Tracy v. The New York and Harlem R. R. Co.*, 615

16. Contempt.

1. The fact that the plaintiff has not done enough at the time of pro-

judgment is demanded, is sufficient under section 162 of the Code. It is not necessary to allege that the defendants made the note, nor to show how they are connected with it.

So held, where the note sued upon was signed by a firm. *Butchers' and Drivers' Bank v. Jacobson*, 595

2. In an action to recover money lost at play, a complaint pursuing the form allowed by 2 Rev. Stat., 347, § 1, for declarations in actions of debt to recover any money, goods, and things received contrary to statute, stating that on a day named, the defendant received a specified sum belonging to, or on account of the plaintiff, and which is now due him, contrary to the provisions of the statute, designating it, is not demurrable for not stating facts sufficient to constitute a cause of action. The averment that the money was received and is due plaintiff is sufficient upon demurrer, and the superfluous statement that it was received contrary to statute, will not vitiate the complaint. *Betts v. Bachs*, 614

3. A complaint alleging that between specified days the plaintiffs sold and delivered to defendant, at his special instance and request, a large quantity of boots and shoes of a specified value, and that there is due and unpaid therefor a sum designated which he promised to pay them; but thought often requested by them, has wholly refused, is sufficient on demurrer. *Phillips et al. v. Barillett*, 678

4. In an action by several plaintiffs to recover for goods sold and delivered, an allegation of partnership is not necessary, and the allegation of sale and delivery sufficiently implies that the goods belong to the plaintiff. *id.*

2. Answer.

1. It seems that illegality in a contract sued on, though shown by the

testimony, cannot avail the defendant, unless it is alleged in the pleadings; and that an allegation in the answer that the contract was illegal, coupled with an enumeration in the same paragraph, of specific grounds of illegality, does not entitle the defendant to prove any ground of illegality not so specified. *Dingeldein v. The Third Avenue Railroad Co.*, 79

2. The plaintiffs alleged in their complaint, that their assignors having chartered a vessel, earned freight, which the defendants, the consignees of the vessel, had collected and refused to pay over. The defendants in their answer denied that the plaintiffs' assignors had chartered the vessel in any other way than by a charter-party, which provided that their right to any share of the freight should be contingent on the freight exceeding \$25,000.

Held, That this put in issue plaintiffs' allegation of a charter, and that the plaintiffs must prove, either an unconditional charter, or that under the charter alleged by defendants the freight had exceeded \$25,000. *Patrick et al. v. Metcalf et al.*, 483

3. It is essential to the sufficiency of an answer stating new matter as a defense, that it state facts which, if true, will bar the action, or so much of it as is attempted to be answered. *Carter v. Koxley*, ... 583

4. In an answer setting up title or right of possession to land, under a sale for taxes, it is not enough to allege that the property was duly sold for non-payment of a tax duly imposed according to the statute. It is essential to state facts showing that a tax was duly imposed on the property, for the non-payment of which the authorities might lawfully sell it, and that the proof of non-payment required by the statute to authorize a sale, had been made. *id.*

5. An answer, which is defective in this respect, is not aided by section 161 of the Code of Procedure, which authorizes pleading a judgment or other determination of a Court or officer of special jurisdiction, by stating that it was duly given or made, without stating the facts conferring jurisdiction. If the imposition of a tax could be deemed to be within this provision, the answer should designate by whom the tax was imposed....*id.*

6. In an action brought to enjoin the defendants from infringing plaintiffs' trade mark, an answer alleging that the defendants had sold only a very small and specified quantity of merchandise bearing the label complained of, and that the same was sold to the plaintiffs' agent at their request, and that the use of the label was accidental, without intent to defraud plaintiffs or imitate their label, and did not represent the article to be the plaintiffs', is not frivolous. *Guthon et al. v. Lindo*,.....605

7. An allegation in the complaint that an assignment, which the plaintiffs seek to set aside, was made with intent to hinder, delay and defraud creditors, &c., is sufficiently put in issue by a denial that the assignment was made with intent to hinder and defraud creditors. *Read et al. v. Worthington et al.*,.....617

8. Upon a complaint being amended in a material particular, the defendant's right to answer the amended complaint, by interposing any defense which he may possess, is absolute and unrestricted. *Harriott et al. v. Wells et al.*,.....631

9. Thus, where, upon a trial of an action brought upon a contract, of which the plaintiffs, in their complaint, alleged performance on their part, they failed to prove full performance, but gave evidence of a waiver of such performance by the defendants, and asked leave to

amend their complaint accordingly, which was allowed on condition that the defendants be allowed to amend their answer so as to meet the plaintiffs' amendment, but the terms or nature of the amendment to be made by defendants was not prescribed:

Held, On defendants' motion after judgment, for leave to amend the answer by interposing the statute of limitations, that unless the plaintiffs elected to withdraw their motion to amend, the judgment should be vacated, and the defendants allowed to amend by interposing the statute of limitations or any other legal defense, without restriction.....*id.*

10. The objection that the allegations of an answer are hypothetical, is not available on demurrer. *Taylor v. Richards et al.*,.....679

11. A defendant in his answer, in order to avoid the cause of action alleged, need not confess it; he may aver that if any such contract as alleged was made, it was made jointly with others.....*id.*

12. An answer setting up the non-joinder of third persons, averred to be jointly liable with the defendants, sufficiently alleges that they are still living, if it alleges that they reside at a place named....*id.*

See AMENDMENT, 1.

PLEDGE.

1. A mortgage of real property (with the bond to which it is collateral) is the subject of a pledge. Mortgages are now regarded as mere securities and chattel interests, and may be pledged like other chattels and things in action. *Campbell v. Parker*,322

2. Where a bond and mortgage are transferred by an assignment absolute on their face, but accompanied by a promissory note, made by the assignor, which gives the assignee authority to sell the bond and mort-

gage, upon default of the assignor to pay his debt, the transaction is a pledge of the bond and mortgage, and not a mortgage or sale of them.....*id.*

3. The assignee, in such a case, acquires only a special property in them, and is subject to all the duties and obligations of a pledgee. He has no right to sell them, without, at least, a demand upon the assignor for payment of the debt.....*id.*

4. Where, in such a case, the pledgee, without demand or notice, transferred the bond and mortgage to a third person, for a sum sufficient to pay the debt, but grossly inadequate to the value of the bond and mortgage, and the latter canceled them.

Held, That this was a conversion of them, and the pledgee was liable, therefore, in an action in the nature of trover.....*id.*

5. Such subsequent transfer of the bond and mortgage having been not a sale, but a device to get the mortgage satisfied, and the plaintiff, the assignor, having tendered the debt due, and demanded a reassignment, it is immaterial whether the assignment be regarded as a pledge or a mortgage, for in either case a tender would destroy the pledgee's lien, and trover would lie for the refusal to deliver. (*Per* BOSWORTH, Ch. J.) *id.*

6. The Broadway Bank loaned money to C., for which they received from him a pledge of stocks as collateral security. They also discounted several notes for him, and received from him a draft on a distant place for collection. Before it was known whether the draft was paid or not, he applied to the president of the bank, saying that he must have the proceeds of the draft immediately, or must suspend payment; and the president, asking for collateral security, he answered, "The bank holds all my stocks, and they

are security for all my discounts and this draft," to which the president replied; "If that is so the bank will put the proceeds of this draft to your credit," which was thereupon done.

Held, That this was a pledge in present of the stocks, as security for all the discounts which had been made for C., as well as for the draft in question. (ROBERTSON, J., dissented.) *Van Blarcom et al. v. The Broadway Bank*,532

POLICE.

1. The Mayor of the City of New York, claiming, but without right, to be at the head of the police of the city, and having under his control a large body of men organized for that purpose, and known as the Municipal Police, was informed that the Metropolitan Police, which was then the legal police force of the city, were about to eject the Street Commissioner of the city from his office in the City Hall, violently and without process of law. He accordingly called together the Municipal Police, and while they were guarding the building, a Coroner, having an order for the arrest of the Mayor, came to the City Hall to execute it, accompanied by a number of the Metropolitan Police, as a *posse comitatus*, of which the plaintiff was one. Their attempt to enter for the purpose of arresting the Mayor was resisted by the Municipal Police, and in the fray the plaintiff was injured.

Held, 1. That, although the Municipal Police, as an organized police force, was an illegal organization, and the Mayor had abused his authority in keeping it on foot, yet that such assemblage of the men, if solely for the purpose of resisting a forcible expulsion of the Street Commissioner from his office, assuming, as the charge did, that "the Mayor, in his discretion, was authorized, as chief magistrate of the city, to interpose by force, if necessary, to prevent it," was not, necessarily, as matter of law, an unlaw-

ful assembly. The Mayor, being charged with the duty of causing laws for the preservation of the peace to be kept, is not confined to calling to his aid the lawful police for the purpose of resisting unauthorized violence, but may call on any citizens, and may by their aid resist the lawful police, if they are about to commit such wrong. *Slater v. Wood*,15

2. That if the assembly were claimed to be unlawful by reason of the circumstances under which it appeared, and the manner in which the persons composing it were conducting themselves, the question whether these circumstances and conduct were such as would alarm persons of reasonable firmness and courage, is one which belonged to the Jury to decide. .*id.*

2. If the assembly was not an unlawful one, the Mayor is not liable in a civil action, for wrongs done by individual members of it, having no connection with the object for which it was convened, to which he was in no way privy, and of the purpose to commit which he had no knowledge or suspicion. .*id.*

3. And if the Mayor did not know that the Coroner had previously come to serve the order of arrest, and took no measures to secure a free entrance to him, the mere fact that the Coroner, on coming with the *posse*, made proclamation at the entrance of the City Hall, of the object of his visit, and was resisted by the Municipal Police, would not make the Mayor liable for the plaintiff's injuries.*id.*

POLICY.

See INSURANCE, 1, 2

POSSE COMITATUS.

See POWER OF THE COUNTY.
CORONER, 2.

POWER OF THE COUNTY.

1. Under the Code of Procedure (§§ 185, 419), the Coroner may

call to his aid the power of the county, in a proper case, in executing an order of arrest in an action in which the Sheriff is a party. *Slater v. Wood*,15

2. The mere fact that the officer had not, at the time of summoning the power of the county, a sufficient cause for summoning them, does not affect the duty of the persons summoned to aid him, if, when they come together, resistance is offered to his executing the process, nor does it affect the consequent liability of those who made or caused such resistance, except that it may perhaps affect the question of damages.*id.*

PRACTICE.

1. *Parties.*
2. *Appearance.*
3. *Guardian, ad litem.*
4. *Service.*
5. *Arrest.*
6. *Attachment.*
7. *Motion.*
8. *Discovery and Inspection.*
9. *Trial.*
10. *Variance.*
11. *Exceptions.*
12. *Verdict.*
13. *Judgment.*
14. *Costs.*
15. *Amendment.*
16. *Contempt.*
17. *Set-off.*
18. *Appeal.*

1. Parties.

1. It seems that the objection of non-joinder of other parties, is waived by setting up a counterclaim in favor of the defendant jointly with the same parties, against the plaintiffs. *Secor et al. v. Law*,163

2. The plaintiff having a fund in the hands of the defendants, his bankers, directed them to place the same to the credit of accounts to be opened by them for the purpose, in the names of his children,

- who were of tender years; but after the defendants had done so, they continued to recognize the authority and directions of the plaintiff in the management of the fund, and it did not appear that he had been indebted to the children, or had received any consideration upon the transfer of the credits, or that the children ever had notice thereof, or received possession of the securities:
- Held*, That, notwithstanding such change in the accounts, the plaintiff could maintain an action in his own name, to recover from the defendants the balance due thereon.
3. The change in the accounts, under such circumstances, is neither a transfer of the fund or securities themselves, nor a gift *in presenti* nor in *futuro*. *Geary v. Page et al.*, 290
 4. The common law rule that in an action on a joint contract, against several persons, the plaintiff cannot recover against either, without establishing that the contract sued upon is the joint contract of all, still applies in actions which were commenced before the enactment of the Code of Procedure. *Fielden et al. v. Lahens et al.*, 436
 5. The provision of section 274 of the Code of Procedure, altering this rule, does not affect actions commenced before the Code; and section 459 of the Code, as amended in 1851, which makes all its provisions apply to future "proceedings" in actions theretofore commented, merely prescribes the forms to be observed, and does not modify or repeal any rule of law affecting a defendant's liability or a plaintiff's right to recover. *id.*
 6. *It seems* that one to whom a fund was rightfully payable, cannot maintain an action against another, who, merely as agent for an adverse claimant, has collected the fund on behalf of the latter, in disregard of notice from the former not to do so. *Patrick et al. v. Metcalf et al.*, 483
 7. A grantee of land, under a deed which is void by the statute, by reason of the land being held by a third person adversely to the grantor, cannot, upon his grantor's refusal to bring an action to recover the land or to allow such action to be brought in his name, maintain an action against the grantor and the adverse possessor, to have the latter adjudged to surrender possession to the grantor, and the title and possession adjudged to the plaintiff as against the grantor. *Louber v. Kelly et al.*, 494
 8. An action to recover the lands must be brought by the grantor, or in his name, by the grantee; but it cannot be so brought in his name without his consent, except since the statute of 1862. *id.*
 9. The provision of the Code of Procedure — that in actions for recovery of real or personal property, third persons, having an interest in the subject matter may be brought in as parties, upon their own application — is only intended to extend the power formerly possessed by courts of equity, in this respect, to the legal actions designated; and its application is confined to the class of cases in which a bill of interpleader would have accomplished the same end. *Hornby v. Gordon*, 656
 10. In an action brought by a vendor of goods, to recover possession of them, on the ground of fraud on the part of the purchaser, third persons claiming under the purchaser, by virtue of contracts with him, and in hostility to each other, should not be granted leave to come in as parties. *id.*
2. *Appearance.*
1. The Corporation of the City of New York, with the consent of the counsel to the Corporation, may appear, in actions to which they

are parties, by other attorneys of record, and other counsel. *The Mayor, &c., of New York v. The Exchange Fire Ins. Co.*,.....424

3. *Guardian ad litem.*

1. In an action in which the Court have jurisdiction of the parties and the subject matter, the omission of an infant plaintiff to procure the appointment of a guardian *ad litem*, is an irregularity which may be cured or waived. It does not deprive the Court of jurisdiction. *Rutter v. Puckhofer et al.*,.....638
2. The defect is cured if the plaintiff attains majority before the defendants raise any objection.....*id.*

4. *Service.*

1. Under the Code of Procedure, (§§ 185, 419,) the Coroner may call to his aid the power of the county, in a proper case, in executing an order of arrest in an action in which the Sheriff is a party. *Slater v. Wood*,.....15
2. The mere fact that the officer had not, at the time of summoning the power of the county, a sufficient cause for summoning them, does not affect the duty of the persons summoned to aid him if, when they come together, resistance is offered to his executing the process, nor the consequent liability of those who make or cause such resistance, except that it may perhaps affect the question of damages.....*id.*

5. *Arrest.*

1. In an action to recover the possession of specific personal property, an order of arrest which recites that the cause of action is for a detainer or conversion, and requiring the Sheriff to hold the defendant to bail, in a specified sum, is unauthorized. In such an action, the ground of arrest is a concealment, &c., of the property, and the order must require an undertaking to pay the amount which may be recovered. *Elston v. Potter*,....636

6. *Attachment.*

1. The Code of Procedure does not authorize the issue of an attachment, as a provisional remedy in an action of an equitable nature, where the amount which the plaintiffs may recover must be ascertained by an accounting, and the costs are in the discretion of the Court. *Guilhon et al. v. Lindo*, 601
2. Thus, where in action for an injunction against the infringement of a trade-mark, and for damages, an attachment was issued; *Held*, that it was improvidently granted, and must be set aside. Such an action is not "an action for the recovery of money" within the meaning of section 227 of the Code.....*id.*

7. *Motion.*

1. When the interference of the Court to set off, against a judgment, the costs of an appeal from an order on a summary application after judgment, is invoked by motion, and not by an action, the question is in the discretion of the Court. The Court may, in its discretion, deny such motion, even where the set-off might be enforced by an action. *Purchase v. Bellows*,.....642
2. In an action on a policy of marine insurance, the defendants' remedy, to compel a disclosure by the plaintiff of the number of packages, or the quantity and nature of the cargo lost or injured, and the items of expenses incurred, is by requiring a bill of particulars, rather than by motion to make the complaint more definite. *Cockroft v. The Atlantic Mutual Insurance Co.*,...681
3. Section 158 of the Code of Procedure authorizes the Court to order a bill of particulars in such case; and the fact that the usual preliminary proofs or adjustment of loss had been made before the

action, does not impair the defendants' right to a bill of particulars. *id.*

8. *Discovery and Inspection.*

1. Under section 388 of the Code of Procedure, which enlarges the remedy for obtaining discovery and inspection of books and papers pending suit, if a party establishes, to the satisfaction of the court or justice, that any book, paper or document is in the possession or under the control of the adverse party, containing competent evidence relating to the merits of the action or defense, its production for inspection may be compelled. *Case v. Banta*, 595

2. Thus, where in an action for breach of warranty on a sale of goods, the plaintiffs made affidavit that there was a written contract, which they had not known or had forgotten at the commencement of the action, and that it was in the possession of defendant, who refused to exhibit it or give a copy, and that it was material to them in the action: *Held*, that they were entitled to an order requiring defendant to give them an inspection and copy, or permission to take a copy. *id.*

9. *Trial.*

1. In an action to recover possession of specific personal property, and damages for its detention, it is proper that the Jury, on finding for the plaintiff, should assess the value of the property, as well as the damages, although the plaintiff has obtained a delivery before the trial. (BARBOUR, J., dissented.) *Tracy v. The New York and Harlem Railroad Co.*, 396

2. The Court will not reverse a judgment because the Referees, before whom the cause was tried, excluded an offer of further evidence on the part of the plaintiffs, made after the plaintiffs had rested and a nonsuit had been directed, unless the offer of such evidence showed at least

the counsel's belief that the evidence, if admitted, would aid the plaintiffs. *Fielden et al. v. Lakes et al.*, 436

3. Negligence, whether on the part of the plaintiff or the defendant, is a question of fact for the Jury to determine. *Williams v. O'Keefe et al.*, 536

4. Unless the proof of negligence on the part of the plaintiff is so strong that the Court would set aside a verdict in his favor as being clearly against the weight of evidence, it is not proper to take that question from the Jury, by granting a nonsuit at the trial, 54

5. Where usury is the defense, the plaintiff has a right to have the question whether there was a corrupt agreement, submitted to the Jury; especially where it is to be made out from circumstances, and must be determined, in a great degree, from the intent of the parties. *The Chatham Bank v. Betts*, 552

6. Where, in case of a breach of trust, the fund remains land, and the plaintiff frames his action to seek specific, equitable relief, joining as defendants with the trustees, third persons who claim an interest in the land, and pending the action the plaintiff files a supplemental complaint, in which he alleges that the land has meanwhile been converted into money, and claims a judgment for damages, as well as all the relief asked in the original complaint, not inconsistent therewith, the action is still triable by the Court without a Jury. *Currie v. Cowles et al.*, 642

See EVIDENCE, 6.

JUDGMENT, 5.

SHERIFF, 4.

WRECK, 5.

10. *Variance.*

7. In an action to recover compensation for services, alleged in the complaint to have been performed,

open a promise to pay therefor at an agreed rate of compensation, if the proof is that they were performed on a promise to pay what they were reasonably worth, the variance is immaterial, and the defendant not being misled thereby, the Court may allow an immediate amendment, without costs. *Scott v. Lichtenhal*, 224

11. Exceptions.

8. Where, on request of defendant's counsel, the Court directed that all the evidence of certain witnesses relating to the value of services (and which evidence consisted of their opinions based on the testimony they had heard at the trial) should be subject to exceptions taken in the examination of preceding witnesses; but the exceptions thus referred to related solely to proof of the "ability of the plaintiff as a bookkeeper," or to the objection that such witnesses did not possess the special knowledge essential to make their opinion admissible as evidence:

Held, That this was not equivalent to a specific objection that such latter witnesses did not know what were the particular services, of the value of which they were permitted to express an opinion; but it might be considered in deciding whether the exceptant should be allowed a new trial on terms. *id.*

9. In case a demand made on behalf of the plaintiffs to have the cause submitted to the Jury does not suggest what question, if any, they should be called to pass upon, it is too broad to sustain an exception on a refusal of the demand. (*Per Moncure, J.*) *Taylor et al. v. The Atlantic Mutual Insurance Co. et al.*, 369

10. An exception to a refusal to charge as requested cannot be sustained, where the case states that the Judge refused to give the instructions requested, except so far as they were embraced in the

charge which was in fact given, but does not state the whole of the charge given, so as to make it appear that the request was actually disregarded. *The Mayor, etc., of New York v. The Exchange Fire Insurance Co.*, 424

11. In order to exclude a question which calls for the opinion of a witness, for the reason that he has not been shown competent as an expert, such reason must be specified in the objection. A general objection is properly overruled. *Mallory et al. v. Perkins et al.*, 572

12. Verdict.

1. A general verdict in favor of one party, rendered by the Jury, in obedience to the instructions of the Judge, cannot be corrected on motion, so as to transform it into a verdict for the other party. *Brush v. Kohn*, 589

2. Wherever the Court, on a supposed state of facts, instructs the Jury, if they so find the facts, to render a verdict for the plaintiff, when the instruction should have been to find, in that event, a verdict for the defendant, the remedy, if no exception is taken, is to move, on a case, for a new trial. *id.*

3. This rule applies where the defendant tendered and paid into Court the amount due, and the Judge directed, and the Jury accordingly found, a verdict for the plaintiff for that sum, instead of a verdict for defendant. *id.*

13. Judgment.

1. In an action where the answer by the defendants alleged that they gave acceptances for the amount which the plaintiffs had never surrendered, was struck out upon motion as sham, and judgment entered for the amount claimed, with interest from the date specified as the average maturity of the credits:

Held, on appeal, that as this was the amount which the plaintiffs were

entitled to be paid, and was the precise sum which would have been recovered on the acceptances, the judgment was right and must be affirmed. *Blakely v. Jacobson et al.*, 140

2. Where an action is tried before the Court without a Jury, the only authority for entering judgment is the decision of the Judge who tried the cause. A reference to compute the amount of the recovery, if not authorized by the decision, is irregular. *Chamberlain v. Dempsey*,212

3. Where, on a trial by the Court without a Jury, of an action for the foreclosure of a mortgage, the Judge omits to determine the amount due to the plaintiff, or to direct that there be a reference to ascertain it, and a reference for that purpose is ordered on an application to another Judge, a judgment entered on the report of the Referee so appointed is not only irregular, but erroneous; there is virtually a mistrial, and, on appeal from the judgment, it will be reversed.*id.*

4. S., one of the defendants, held real and personal property in trust, to be used for the joint benefit of himself and the plaintiff and a third person, in specified proportions, as copartners in a joint enterprise, and under an agreement that he was to make advances for carrying out the enterprise, and that all stocks, or other securities than cash, which should be received, should remain undivided until a final settlement, and that he would not dispose of the property (other than money) without the consent of the others. He accordingly made large advances, and subsequently sold and conveyed all the property without the consent of the plaintiff, and received therefor stock of an incorporated company:

Held, that the plaintiff, by bringing an action with full knowledge of these facts, in which he demanded a transfer of his share of the stock, and obtained an injunction against any

disposal of it pending the action, must be deemed, for the purposes of the suit, to have made his election of this remedy, and must be treated as if he had consented to the sale. *Cheeseman v. Sturges et al.*, 246

5. Hence, the proper relief in such action is, that the plaintiff should pay his proportion of the advances and have a transfer of his share of the stock, and, in default of his paying, that his share of the stock should be sold, and that he should pay the deficiency, if any.*id.*

6. The plaintiff is not entitled to a judgment that the whole stock be sold to pay the advances, and that the residue of the proceeds, or the deficiency, if any, be apportioned. The defendant may be allowed to retain his share of the stock, on being charged with his part of the advances.*id.*

7. After the commencement of the action, but before the trial, the corporation, the stock of which was in controversy, increased its capital stock, without, however, altering the nominal value of a share; and, subsequently, certificates of stock of the new issue were deposited in Court to await the result of the action:

Held, that if the plaintiff desired to make any claim against the defendant, based on his individual acts, in effecting such alteration in the stock pending the action, he should have modified his pleadings accordingly. But by going to trial, he must be deemed to pursue the stock as it existed after such increase.*id.*

8. Where an action upon an official bond, e. g., the bond of an administrator, is brought in the name of an individual plaintiff, and not in the name of the people, the judgment should not be for the amount of the penalty, but only for the amount of the damages and costs. *O'Connor v. Such et al.*,318

9. Where, upon the trial of an action for the foreclosure of a mortgage upon real property, the Judge directed judgment for the plaintiff, without, however, awarding costs, and ordered a reference to ascertain the amount due the plaintiff and whether there were any prior liens, &c., and upon the coming in of the report the plaintiff applied to another Judge, without notice to the other parties, and obtained final judgment awarding costs:

Held, that the judgment was unauthorized, and should be reversed on appeal. Whether the first decision was intended to be final or not, it did not warrant such a judgment. The Judge before whom the cause was tried, alone is competent to pass on the question of costs. *Chamberlain v. Dempsey*, 540

10. A judgment directed the defendant to execute a conveyance upon the written demand of the plaintiff; the plaintiff served a copy of the judgment with a written demand, and two months afterward presented to the defendant a proper conveyance, and required its execution.

Held, that defendant's objection that the written demand was not served at the time of requiring the conveyance, was untenable. *Morris v. Walsh*, 636

11. It is no excuse for refusing to execute a conveyance directed by a judgment of Court, that there is no person present to become subscribing witness, nor any commissioner to take the grantor's acknowledgment, or that there is no seal attached to the instrument. *id.*

12. Where, pending a suit brought by a creditor to reach the assets of his debtor, the latter is, by proceedings previously commenced in another Court, adjudged to be an habitual drunkard, and a committee is appointed of his estate, the Court in which the former suit is pending cannot properly proceed to final judgment. *Niblo v. Harrison et al.*, 638

14. Costs.

1. Where the Court has directed the employment of a stenographer on the trial of a cause, the order providing that the expense should be paid by the parties in specified proportions, the prevailing party cannot tax what he paid therefor, as a disbursement in the cause. Section 256 of the Code, which authorizes the employment of stenographers in the first judicial district, contemplates that both parties should share the expense. *Gilman v. Oliver*, 589.

2. The only disbursements which are to be allowed in adjusting the costs in a civil action under the Code of Procedure, are those specified in section 311 of the Code. *Hanel et al. v. Baare et al.*, 682

3. The expenses of exemplified copies of foreign documents are not taxable, especially where there is no affidavit that the documents were actually and necessarily used, or obtained necessarily for use. *id.*

15. Amendment.

1. Where defendants had appealed to the General Term from an order of the Special Term, denying a new trial, under a stipulation that the appeal be heard there without judgment or security; and after the order was affirmed upon the appeal, judgment was entered, and the defendants appealed from the decision of the General Term to the Court of Appeals:

Held, That they were not entitled to have the judgment amended by adding that exceptions had been heard and overruled by the General Term. If defendants feared the Court of Appeals would not regard the exceptions, they should have taken an appeal from the judgment, and the exceptions would necessarily form part of the judgment record. *Tracy v. The New York and Harlem R. R. Co.*, 615

16. Contempt.

1. The fact that the plaintiff has not done enough at the time of pro-

curring defendant's conviction of a contempt in disobeying a portion of a decree, to procure his conviction for a disobedience of another portion, does not disable the plaintiff from doing such other acts as are necessary to put the defendant in contempt in that respect. *Morris v. Walsh*,636

17. Set-off.

1. A motion to set off against a judgment, the costs of summary proceedings after judgment, may properly be denied where the objection to the set-off is the attorney's claim to a lien on the costs of such proceeding after judgment, and the debtor being poor, the existence and protection of the lien was important to his securing the services of the attorney. *Purchase v. Bellows*,642

18. Appeal.

1. Where defendants had appealed to the General Term from an order of the Special Term, denying a new trial, under a stipulation that the appeal be heard there without judgment or security; and after the order was affirmed upon the appeal, judgment was entered, and the defendants appealed from the decision of the General Term to the Court of Appeals:

Held, That they were not entitled to have the judgment amended, by adding that exceptions had been heard and overruled by the General Term. If defendants feared the Court of Appeals would not regard the exceptions, they should have taken an appeal from the judgment, and the exceptions would necessarily form part of the judgment record. *Tracy v. The New York and Harlem R. R. Co.*,615

2. Where, on an appeal being taken, no case is made or served, the respondent may, upon the cause being regularly called on the calendar, and the appellant being in default, take a judgment of affirmance. He is not bound to move to

dismiss the appeal, or to strike it from the calendar. *Oders v. Grouse*, 638

PRESUMPTION.

See DAMAGES, 3.

PRINCIPAL AND AGENT.

1. The defendants, *del credere* factors, on being applied to by their principals for advances rendered on account of sales, showing sales at various dates, and specifying an average date at which the total balance would become due, and gave their acceptances for the amount payable at that date; but before the acceptances matured, they gave their principals notice that they could not pay them.

Held, that the giving of the acceptances was no bar to an action by the principals against the factors upon their liability as such, and that in such action the defendants were liable for interest from the day specified, without any further demand. *Blakely v. Jacobson et al.*, 140

2. The possession, by the transfer agent of a corporation, of the transfer books of its stock, and his authority to allow them to be used, do not constitute the *indicia* of an authority to make representations as to the ownership of stock, so as to render the company liable for the falsity of such representations made by him. *Henning v. The New York and New Haven R. R. Co. et al.*,283
3. Nor does mere permission, given by the agent, to enter upon such books a transfer of reputed stock, there being no new certificate given, amount to a representation by him that the person making the transfer was the owner of any genuine stock.id.
4. Where bankers and collecting agents receive from their correspondents engaged in the same

- business at another place, negotiable paper indorsed to them by the latter, the indorsement being expressed to be "for collection," and they do not credit their correspondents with it, but enter it in account as received for collection; and the circumstances and the course of dealing are such that they are not under any obligation to credit their correspondents with its amount until it be paid at maturity, and there is no understanding between them and their correspondents, that remittances, or a delay to draw for cash balances, are to be influenced by the fact of holding paper sent for collection and not matured; they cannot, as against the owners who delivered the paper to their correspondents for collection, retain it on the ground of an unpaid balance due to them from such correspondents. Delay to draw for a cash balance, and the making of advances or remittances, after receiving the paper for collection, do not, under such circumstances, make them *bona fide* holders for value, so as to give them a superior title. *Hoffman et al. v. Miller et al.*, . . . 334
5. In such a case, testimony by the plaintiffs, the collecting agents, that in making remittances after receiving the bill in question, they looked to, and relied on the unmatured paper in their hands for collection, is not entitled to any weight, if neither any agreement nor the course of dealing between them, authorized them so to rely, and their correspondents had no reason to suspect that any remittance made to them was influenced by any such consideration. *id.*
6. In an action against bankers or collecting agents, to recover damages for their neglect to present a note intrusted to them for collection, or give notice of non-payment to the indorsers, the burden of proof is on the defendants to show the insolvency of the indorsers, if they rely on that fact as a defense. *Coghlan v. Dinwiddie*, 453
7. Whether the burden of proof is upon the plaintiff to show the insolvency of the maker. *Query? id.*
8. The plaintiffs, who were engaged in the business of purchasing hardware, abroad, upon commission, and shipping it to the persons for whom they had received orders therefor, received an order from the defendant in the following terms: "I annex memorandum of chains, which please forward by an early packet, giving the preference to the 'Black Ball Line,' at lowest rate of freight;" this was followed by a description of the goods, and it terminated with expressing "hopes that the quality, price and charges would be so favorable as to enable him to give them further orders." They made a contract in England for the purchase of the goods in their own name, the defendant being unknown there, and notified him that the goods were contracted for; and they paid for them, and subsequently shipped them, consigned to the defendant, by the "Black Ball Line," receiving a bill of lading therefor, which contained an exception exempting the carriers for liability for loss by fire. Before having left port the goods were injured by a fire which occurred upon the vessel, and were sold for whom it might concern.
- Held*, That the relation between the plaintiffs and the defendant was not that of vendor and vendee of the goods; but the plaintiffs were the defendant's agents for their purchase, and as such agents, were not bound to insure the goods. (BARBOUR, J., dissented.) *Field et al. v. Banker*, 467
9. In such a case the plaintiffs are not barred from maintaining their action to recover the price paid by them, and their commissions, by reason of their having accepted for the goods a bill of lading exempting the carriers from their common law liability. Since the goods were not wholly lost, but only injured, the defendant's claim, if any, on

that account, must be established by him affirmatively, by way of recoupment or counterclaim....*id.*

10. There being, in this case, no evidence that the contract of shipment was out of the usual course, or that the plaintiffs could have made any better one, at the "lowest rate of freight," according to the terms of the order:

Held, That it was correct to instruct the Jury that it was the duty of the plaintiffs to have taken a bill of lading in a proper and usual form, and that the one taken was a sufficient compliance with that duty. (BARBOUR, J., dissented.)*id.*

11. An authority given to attorneys to sue the maker of a note does not empower them to release an indorser without satisfaction or the consent of their clients. *The East River Bank v. Kennedy*,.....543

12. Declarations or admissions in respect to the stowage of a cargo, made by a stevedore while employed by the owner of a cargo to stow it, are not admissible in evidence against the owner. *Mallory et al. v. Perkins et al.*,.....572

PRINCIPAL AND AGENT.

See FACTOR, 1, 2.
INSURANCE, 1.

PRINCIPAL AND SURETY.

1. The indorser of a promissory note which was past due, induced the holders of it to sue the maker; and, pending the action, and with the assent of the indorser, the plaintiffs' attorneys received from the maker a part payment, and his note for the residue, upon a written stipulation that proceedings should be stayed, but if the new note should be unpaid at maturity, judgment should be entered in the action against him; and they thereupon surrendered the original note, but nothing was said about releasing the indorser.

Held, in an action brought by the same plaintiffs against such indorser, that the surrender of the original note being explained by the plaintiffs' attorney as having been inadvertently made, these facts did not constitute any agreement to discharge the indorser. *The East River Bank v. Kennedy*, 543

2. Upon such evidence, it was error to leave it to the Jury as a question of fact whether an agreement to discharge the indorser was made.*id.*

PROMISSORY NOTES.

See BILLS AND NOTES.
USURY, 3.

PROVISIONAL REMEDIES.

See ATTACHMENT.
CLAIM AND DELIVERY.

R.

RAILROAD COMPANY.

See CONTRACTS, 4, 5.

REFEREE AND REFERENCE

1. At the close of the trial, it is in the discretion of a Referee whether he will allow depositions to be read as to matters which should be proved by a plaintiff or defendant before he rests, and his refusal to allow it is not matter of exception. *Delafield v. De Grauw*,.....1
2. Moreover, where such depositions are not embodied in the case on appeal, the Court cannot review the Referee's discretion in this respect.*id.*
3. Where the Receiver of a dissolved corporation brought an action against the executors of the deceased president and treasurer, to recover from his estate the amount of moneys of the corporation which he had loaned to stockholders, without

authority and contrary to the statute, the defense interposed was, that the trustees of the corporation had ratified the act. The Referee before whom the cause was tried reported substantially the facts alleged in the complaint, and, as a conclusion of law, found that the plaintiff was entitled to recover, but did not expressly negative the alleged ratification. The only evidence of any ratification was, that, in an annual report of the company, part of the sum was mentioned as loaned to certain stockholders.

Held, that the judgment for the plaintiff was correct. *Clarke v. Acosta et al.*, 158

4. A finding of the Referee contained in the case as settled, that the deceased, after making the loan, informed the trustees and stockholders that he had made it, there being no other evidence of his giving such information than the annual report above mentioned, does not conflict with the presumption arising from his reporting in favor of plaintiff that he found against the defendants on the question of ratification. . . . *id.*

5. Where a complaint, as originally framed, set up three separate causes of action, but, after the proofs were closed upon the trial and the cause submitted, the Referee permitted an amendment thereto by adding a statement of a fourth cause of action, (demanding the same sums as were demanded in the original complaint,) in which it was alleged that, the defendant having claimed damages for delay in the work, the parties, on an accounting of all these claims, including such last mentioned claim, found a specified balance due, which defendant promised to pay:

Held, 1. That the defendant, by amending his answer, and taking issue on such new cause of action, waived all objections to the propriety of permitting the amendment.

2. That the amendment was within the discretion of the Referee, and properly permitted. *Secor et al. v. Law*, 163

6. Where an action is tried before the Court without a Jury, the only authority for entering judgment is the decision of the Judge who tried the cause. A reference to compute the amount of the recovery, if not authorized by the decision, is irregular. *Chamberlain v. Dempsey*, . . . 212

7. Where, on a trial by the Court without a Jury, of an action for the foreclosure of a mortgage, the Judge omits to determine the amount due to the plaintiff, or to direct that there be a reference to ascertain it, and a reference for that purpose is ordered on an application to another Judge, a judgment entered on the report of the Referee so appointed is not only irregular, but erroneous: there is virtually a mistrial, and, on appeal from the judgment, it will be reversed. *id.*

See ACTION, 14.

RENT.

1. The defendant was tenant of a lot of land, and buildings thereon, under a lease from the plaintiff, for the term of three years. The owner of the adjoining lot was, in fact, the owner of a strip of land within and along the side of the demised premises, and on which, in part, the wall of the buildings rested; and he notified the defendant of the encroachment, and that he was about to excavate under the wall, and required him to remove the wall. The defendant gave written notice of this claim to the plaintiff, and required him to defend his rights as he might be advised, and notified him that he should hold him responsible for any damages sustained; but the plaintiff taking no measures to protect the wall or prevent its removal, and the excavation being commenced, the defendant, in view of the danger caused by the undermining of the wall, took it down and rebuilt it on the line of the plaintiff's lot. In the plaintiff's action to recover the rent:

Held, 1. That these facts constituted

such an eviction by paramount title, from a part of the demised premises, as to suspend a portion of the rent, and were available as a defense thereto.

2. That they were also a breach of the implied covenant for quiet enjoyment, and were available as grounds for a counter-claim to the rent. *Moffat v. Strong*,.....57

See LANDLORD AND TENANT, 1-3.

S.

SALES.

1. The plaintiffs, who were engaged in the business of purchasing hardware, abroad, upon commission, and shipping it to the persons for whom they had received orders therefor, received an order from the defendant in the following terms: "I annex memorandum of chains, which please forward by an early packet, giving the preference to the 'Black Ball Line,' at lowest rate of freight;" this was followed by a description of the goods, and it terminated with expressing "hopes that the quality, price and charges would be so favorable as to enable him to give them further orders." They made a contract in England for the purchase of the goods in their own name, the defendant being unknown there, and notified him that the goods were contracted for; and they paid for them, and subsequently shipped them, consigned to the defendant, by the 'Black Ball Line,' receiving a bill of lading therefor, which contained an exception exempting the carriers for liability for loss by fire. Before having left port, the goods were injured by a fire which occurred upon the vessel, and were sold for whom it might concern.

Held, That the relation between the plaintiffs and the defendant was not that of vendor and vendee of the goods; but the plaintiffs were the defendant's agents for their purchase, and as such agents, were

not bound to insure the goods (BARBOUR, J., dissented.) *Feld et al. v. Banker*,457

2. In such a case the plaintiffs are not barred from maintaining their action to recover the price paid by them, and their commissions, by reason of their having accepted for the goods, a bill of lading exempting the carriers from their common law liability. Since the goods were not wholly lost, but only injured, the defendant's claim, if any, on that account, must be established by him, affirmatively, by way of recoupment or counter-claim.....457

3. Tradesmen who sell goods to a wife upon her husband's account, after notice from him not to do so, cannot recover from him therefor, unless they show a subsequent promise by him to pay, or that the goods sold were necessary and suitable to her condition in life, and that she was not otherwise provided for by her husband. *Therriott v. Bagiole*,578

4. If the husband has given such notice, the burden of proof is upon the plaintiffs, to show that the goods sold were necessary and not provided by the husband.....457

SET-OFF.

1. Where a stock broker, without disclosing his principal, or the fact that he acts as broker, contracts to purchase stock, and deposits with the other party to the contract, merely as security for its performance, money which he received from his principal for the purpose, such contracting party, not having parted with anything on the faith of the deposit, cannot, when sued by the principal to recover back the deposit, set off a debt due to him from the broker. (BARBOUR, J., dissented.) *White v. Jaudon*,415

See DAMAGES, 5.



SETTLEMENT.

See ACTION, 3, 4.

SHERIFF.

1. A Sheriff, in respect to property in his custody, is bound to exercise that degree of care, and no greater, which a careful, prudent man of good sense and judgment would exercise respecting such property, if it were his own. *Moore v. Westervelt*,558
2. The provision of section 215 of the Code of Procedure, which requires a Sheriff who takes personal property in proceedings of claim and delivery, to keep it in a secure place, does not require him to remove it from its place of deposit, unless it is unsafe there; and if that place be a vessel at a wharf, he is bound to see that it is properly moored, secured and fastened, against all ordinary perils of winds and waves, and if necessary, protected against any storm or gale, after it arose, by every means within his reach, which a prudent man would use for the purpose, either by removing the vessel to another place, or otherwise; but he is not bound to anticipate a storm of so unusual violence as not to have been reasonably expected.
id.
3. Thus where, in an action to recover the possession of a cargo of coal, from the master of a vessel lying at a pier in the port of New York, the Sheriff took possession, and put a keeper in charge of the coal, with the consent of the master, and the vessel sunk at the wharf during a violent storm; *Held*, in an action to recover from the Sheriff the damages sustained by the coal, and the expense of raising it, that it was only the duty of the Sheriff to take such steps to insure its safety, as a careful, prudent man of good sense and judgment, well acquainted with the condition of the vessel, and her location with

regard to exposure to storms, and having all the power of the Sheriff in the matter, might reasonably have been expected to take, had the coal belonged to himself.*id.*

4. In such action, where the Court properly instructed the Jury as to the Sheriff's duty; *Held*, that a request to charge that the Sheriff is responsible for the negligence of the master and crew, after he took possession, was not proper in form, and it was not error to refuse it.*id.*
5. *Held further*, that the verdict for the defendant was not against the weight of evidence in this case, and that judgment thereon should be affirmed.*id.*

SHIPS AND VESSELS.

1. *It seems* that one part owner of vessels has not, merely as a joint owner of the hulls of the vessels, authority to bind his co-owners, by a contract for the conversion of them into steam vessels, by placing engines in them. *Secor et al. v. Law*, 163

See NEGLIGENCE, 7.

STATUTE OF FRAUDS.

See CONTRACTS, 13.

STOCK.

See CORPORATIONS, 3, 4.

T.

TENANT.

See LANDLORD AND TENANT.

TENDER.

1. Where a factor, having possession of goods consigned to him, on which he has a lien for charges, makes a valid general assignment for the benefit of his creditors, and

delivers such goods to his assignee, and they are subsequently seized by the Sheriff under process against the factor, the assignee is the proper person to whom the owner of the goods should tender the charges, in order to acquire a right to their possession. *Cook et al. v. Kelly*,358

TITLE TO CHATTELS.

1. Where C. and B. formed a partnership in the business of making, selling and letting chronometers, C. contributing all the capital, and B. giving his labor only, and receiving his salary and a share of the profits, and C. agreed to put into the stock of such partnership certain chronometers which were his property, upon a stipulation "that they should be taken at a fair valuation, as a stock in trade, so that upon a sale of them at the usual market price, the profit usual in that branch of business might be made on them," but this agreement was never reduced to writing, as was intended, nor was a valuation ever fixed upon; and, after dissolution of the firm, both partners remained in the store they had occupied as partners, and C. let the chronometers in his own name, and kept his own accounts of them, and there was some evidence that it was understood between the parties that C. was to take the stock and pay the debts:

Held, That after such dissolution, the chronometers were the property of C., and that his lessee of one of them could recover possession of it from B., who had taken it away from him. *Penny v. Black*, ...310

2. Upon such an agreement, the chronometers did not become the property of the firm, but continued always the property of C., the firm having a permission to use them. *Id.*
3. *Held further*, That if this were not so, yet the evidence in this case was sufficient to show that, upon the dissolution of the firm, B.

had relinquished any interest in them, and retransferred them to C. *Id.*

See ACTION, 14.

TITLE TO REAL PROPERTY.

1. In a foreclosure suit, where the defense of usury is interposed by a grantee of the mortgagor, an admission at the trial, and the finding by the Court as a fact, that such grantee is the owner in fee of the premises, imports that the conveyance by which the grantee acquired title, was in hostility to the mortgage, and such a grantee may allege and prove, by way of defense, that the mortgage is usurious. *Chamberlain v. Dempsey*, . .212

2. Under a covenant, in an executory contract, for the sale of a lot of land, by the vendor, to erect upon an adjoining lot, along the boundary line between the two lots, a wall, and to grant and convey to the purchaser the right to use such wall in the erection of a house on the lot so agreed to be sold to him, and "for that purpose to insert the beams thereof into such wall, to the extent of four inches," and two chimney backs to the like extent, and "to keep and maintain such beams and chimney backs therein, so long as such wall should stand," such wall "to be a party wall between the two houses to be built" on such two lots, the contract containing also, in terms, a present grant of such easement in such wall to be built:

Held, That the purchaser did not acquire thereby a right to use such wall in any other way than that so specified; and that he was not entitled to prolong the lintel course of his front wall, across the boundary line of such two lots, so as to enter into the front wall of the vendor's building at the point or line where those walls, meeting, adjoined the party wall. *Fettrick v. Leamy*,510

3. If the vendor erects on such adjoining lot a wall along such boundary line, more extensive than by the terms of such agreement, he is bound to do, although he refuses to allow the purchaser to use it as a party wall, pursuant to such terms, no increased stability or value which a building, erected by the latter on the lot so bought by him, would have derived from such use, if permitted, nor any increased expense of making such building equally stable and secure by other means, arising from not being allowed so to use it, form proper elements in estimating the damages of the purchaser, by such refusal, and it is error to admit evidence thereof, as such. (*Per ROBERTSON, J.*)*id.*

4. The term "party wall," when used in such an instrument, without restrictive terms, and in its general ordinary signification, means a dividing wall between two houses, to be used equally for all the purposes of an exterior wall, by both "parties," that is, by the respective owners of both houses. This use, in its full, unrestricted sense, embraces not only the use of the interior face or side of the wall, but also such use of it as is necessary to form a complete and perfect junction in an ordinary good mechanical manner between it and the other exterior walls of the house. (*Per WHITE, J.*)*id.*

5. In an answer setting up title or right of possession to land, under a sale for taxes, it is not enough to allege that the property was duly sold for non-payment of a tax duly imposed according to the statute. It is essential to state facts showing that a tax was duly imposed on the property, for the non-payment of which the authorities might lawfully sell it, and that the proof of non-payment required by the statute to authorize a sale, had been made. *Carter v. Koenley*, 583

TRADE-MARKS.

1. The Judge, before whom this action was tried at Special Term, having found as conclusions of fact, that the plaintiffs in November, 1856, "compounded from coconut oil and other ingredients a mixture to be used as a hair wash, for which they devised as a trade-mark * * * the name or word 'Cocoaine';" that they published the same very extensively, with notice that they had adopted the said name or title as their trade-mark;" and that the defendants on Nov., 1858, "commenced the preparation and sale of a similar compound in bottles * * *, and with labels under the name and title of 'Cocaine'; and further, (as the fifth finding,) "that the defendants well knowing that the name, word or title of 'Cocoaine' was, and for a considerable time had been, the trade-mark of the plaintiffs, with the wrongful intention of inducing the public to believe that the compound sold by themselves under the name, word or title of 'Cocoaine,' was that of the plaintiff's, and with the wrongful intention of securing to themselves the benefit of the skill, labor and expense of the plaintiffs, have so closely imitated and used the aforesaid trade-mark of the plaintiffs as to deceive the public and to injure and endamage the plaintiffs; that the word, name, title or device 'Cocoaine' is a spurious and unlawful imitation by the defendants of the word, name, title or device 'Cocoaine,' the aforesaid trade-mark of the plaintiff:"

Held, That the plaintiffs were entitled to a judgment enjoining the defendants from manufacturing, using, selling or in any manner disposing of a compound or preparation with the name, word or title of 'Cocoaine' printed or stamped, upon the bottles, labels, wrappers covers or packages thereof. *Burnett et al. v. Phalon*, 192

2. The evidence on which the facts were found is stated in the opin-

- ions delivered, *Robinson*, J. dissenting from the conclusion that it was sufficient to sustain them... *id.*
3. In an action brought to enjoin the defendants from infringing plaintiffs' trade-mark, an answer alleging that the defendants had sold only a very small and specified quantity of merchandise bearing the label complained of, and that the same was sold to the plaintiffs' agent at their request, and that the use of the label was accidental, without intent to defraud plaintiffs or imitate their label, and did not represent the article to be the plaintiffs', is not frivolous. *Guilhon et al. v. Lindo*,.....605
 4. In an action of this nature the judgment cannot direct the damages to be assessed by a Sheriff's Jury. The proofs must be taken by the Court or a Referee.....*id.*
 5. Where, in such a case, judgment is ordered for frivolousness of defendant's pleadings, the judgment should either be in the form proper where nothing is left to be ascertained but the amount of damages, or it should simply adjudge the pleading frivolous and leave the plaintiff to apply to the Court for the relief he seeks.....*id.*

U.

UNLAWFUL ASSEMBLY.

1. The Mayor of the city of New York, claiming, but without right, to be at the head of the police of the city, and having under his control a large body of men organized for that purpose, and known as the Municipal Police, was informed that the Metropolitan Police, which was then the legal police force of the city, were about to eject the Street Commissioner of the city from his office in the City Hall, violently, and without process of law. He accordingly called together the Municipal Po-

lice, and while they were guarding the building a Coroner, having an order for the arrest of the Mayor, came to the City Hall to execute it, accompanied by a number of the Metropolitan Police, as a *posse comitatus*, of which the plaintiff was one. Their attempt to enter for the purpose of arresting the Mayor was resisted by the Municipal Police, and in the fray, the plaintiff was injured.

Held, 1. That, although the Municipal Police, as an organized police force, was an illegal organization, and the Mayor had abused his authority in keeping it on foot, yet that such assemblage of the men, if solely for the purpose of resisting a forcible expulsion of the Street Commissioner from his office, assuming, as the charge did, that "the Mayor, in his discretion, was authorized as Chief Magistrate of the city, to interpose by force, if necessary, to prevent it," was not, necessarily, as matter of law, an unlawful assembly. The Mayor, being charged with the duty of causing laws for the preservation of the peace to be kept, is not confined to calling to his aid the lawful police for the purpose of resisting unauthorized violence, but may call on any citizens, and may, by their aid, resist the lawful police, if they are about to commit such wrong.

2. That, if the assembly were claimed to be unlawful by reason of the circumstances under which it appeared, and the manner in which the persons composing it were conducting themselves, the question whether these circumstances and conduct were such as would alarm persons of reasonable firmness and courage, is one which belongs to the Jury to decide.

3. If the assembly was not an unlawful one, the Mayor is not liable in a civil action for wrongs done by individual members of it, having no connection with the object for which it was convened, to which he was in no way privy, and of the purpose to commit

- which he had no knowledge or suspicion. *Slater v. Wood*,15
4. *Held*, (by WHITE, J.,) that, upon the evidence, the assembly in question was an unlawful one.*id.*

USURY.

1. The contracting party, in an action at law upon a mortgage of real estate, or, in an equitable action to foreclose the mortgage, a defendant who is the owner of the property, or has a valid lien upon it by mortgage or execution, is entitled to interpose the defense of usury as a matter of strict right. *Chamberlain v. Dempsey*,212
2. In a foreclosure suit, where the defense of usury is interposed by a grantee of the mortgagor, an admission at the trial, and the finding by the Court as a fact, that such grantee is the owner in fee of the premises, imports that the conveyance by which the grantee acquired title, was in hostility to the mortgage, and such a grantee may allege and prove, by way of defense, that the mortgage is usurious.*id.*
3. Where P. being asked by T. to discount an accommodation note, replied he had no money, and being asked to procure it to be discounted, took it, indorsed it, and procured the plaintiffs to discount it for him, at lawful interest, and the plaintiffs credited him with the amount; but on his paying over the proceeds to T. he deducted a large percentage. *Held*, That these facts fully warranted the Jury in finding that there was no usury in the transaction between P. and T. *The Chatham Bank v. Betts*,552
4. Where usury is the defense, the plaintiff has a right to have the question, whether there was a corrupt agreement, submitted to the Jury; especially where it is to be made out from circumstances, and must be determined, in a great degree, from the intent of the parties.*id.*

V.

VESSELS.

See SHIPS AND VESSELS.

W.

WAIVER.

1. In an action where it appeared that before the maturity of the note, the maker, who was indebted to the indorsers, paid them a part of the amount of the note, upon their promise to pay the note at maturity and give him further credit, and this transaction was unknown to the other parties:
Held, That the payment and promise having been unknown to the holder of the note until after the commencement of his action against the collecting agents, such facts did not amount to a waiver, on the part of the indorsers, of demand and notice of non-payment, which would exonerate the defendant from any consequences of their neglect to make such demand and give such notice. *Coghlan v. Dinmore*,453
2. *It seems* that an indorser of a note, who, being informed by the maker that he will be unable to pay the note, receives from him, without the holder's knowledge, a part of the amount of the note, promising to pay the note at maturity, and give the maker further time, does not thereby waive demand and notice of non-payment.*id.*

See CONTRACTS, 1, 9.

WITNESS.

1. An agreement, by which a person is to be paid a stipulated sum for giving testimony, on the condition that it leads to the termination of a suit favorable or satisfactory to the other contracting party, who is

a party to such a suit, is illegal and void. *Pollak v. Gregory et al.*, 116

2. Where parties to an action involving the question of the validity of a patent, entered into an agreement with one who was qualified to testify as an expert, by which the former paid the latter \$1,000; and further agreed to pay him \$2,000, upon the condition that the information possessed by him, or the testimony given by him, should enable them to succeed in the action; and further agreed to pay him his traveling expenses, and the usual per diem of an expert, he agreeing, in consideration of the premises, to "hold himself at all times in readiness to give his testimony, or to impart his information, as above, as an expert in said matters:"

Held, That the whole agreement was void; and that he could not recover even his fees, as expert, and his traveling expenses.id.

3. The testimony of a witness, that he is somewhat familiar with book-keeping and accounting, and showing a somewhat intimate familiarity with the bookkeeper's services which are the subject of the action, establishes his competency to testify to the value of those services. *Scott v. Lilienthal*,224
4. It is error to permit a witness who knows nothing of the services in question, except as instructed by the evidence he has heard at the trial, to testify what, upon the evidence the services are worth.id.
5. A deposition is not to be excluded on the ground that the witness was incompetent, by reason of interest, at the time when it was taken, if his oral testimony would be competent by law at the time of the trial, notwithstanding the existence then of the same interest. *Fielden et al. v. Lahens et al.*,...436
6. In order to exclude a question which calls for the opinion of a witness, for the reason that he has

not been shown competent as an expert, such reason must be specified in the objection. A general objection is properly overruled. *Mallory et al. v. Perkins et al.*,...573

7. The testimony of a witness as to a matter of fact is not affected by proof that he was a public officer required by law to make a record of the facts in question; and that such record, as originally made by him, did not contain a statement contained in his oral testimony. Hence, proof of the alteration of the record by subsequent insertion of such statement is inadmissible to contradict his oral testimony.id.

WRECKS.

1. Where a vessel becomes a wreck, and sinks in navigable waters, without fault of the owner, and so as to be immovable by ordinary means, if the owner or any transferee, instead of abandoning it, retains such possession and control as the thing is susceptible of, he is not liable for any injury occurring while he is in the exercise of due care and diligence to prevent it. So long as he is using all reasonable means to effect its removal, without being able to accomplish it, he is not liable for any damages resulting from the mere fact of its non-removal. *Taylor et al. v. The Atlantic Mutual Insurance Company et al.*,....369
2. He is not under any legal obligation to attempt to remove the wreck; and if he chooses he may abandon it, and from that time his liability will cease. (*Per Bosworth, Oh. J.*).....id.
3. Negligence in the use of means to remove the wreck is not necessarily established by proof that the means first employed were inadequate. If they were such as the best skill and the largest experience selected, in good faith, as adapted to the end to be accomplished, negligence cannot be predicted of their failure. The owner is not responsible for failing to remove

the wreck if, after having made proper arrangements for carrying on the work, those arrangements failed without any fault on his part.....*id.*

4. It is not incompatible with the owner's duty for him to adopt a plan for the removal, which embraces the design of saving as much as possible of the wreck and cargo.....*id.*

5. Where a vessel, alongside of a public pier in the city of New York, was burned without any fault of her owner, and sunk to the bottom near the mouth of the slip or basin, thereby obstructing the slip and bulkhead so as to prevent other vessels from coming in, and the defendants, insurance companies, which had insured undivided interests in the vessel, and had accepted an abandonment made by such insured owner, after the loss, employed a man of acknowledged skill and ability in the business of wrecking, who diligently prosecuted his efforts to raise it, until his method failed, and he left the work, when the defendants employed another man of equal skill and ability, who adopted

another plan, and continued diligently working until stopped by cold weather, nearly a year after the vessel sunk, and in the following spring resumed the work, but was soon stopped when very near completing it, by the city authorities, who took exclusive possession and control, and who finally removed the wreck:

Held, 1. That the defendants were not liable to the owners of the pier, for its use in the prosecution of their work, or for damages in obstructing the basin meanwhile, since these facts did not show any negligence on their part.

2. That the defendants were not liable for any delays occurring after the city authorities took possession and control.

3. That the defendants were not liable for any injuries to the pier, done in the course of the work prosecuted by the contractors employed by them.

4. That the above facts appearing from all the plaintiffs' evidence at the trial, the plaintiffs were not entitled to have the cause submitted to the Jury; but it was proper to instruct the Jury to render a verdict for the defendants. (BARBOUR and MONELL, J. J., dissented.) ..*id.*

Esc. J. G.





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